

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2014-346-WS

IN RE:	Application of Daufuskie Island Utility)	PROPOSED ORDER
	Company, Incorporated for Approval of an)	REGARDING DIUC'S
	Increase for Water and Sewer Rates, Terms)	PROPOSED REPARATIONS
	and Conditions)	SURCHARGE
)	FILED ON BEHALF OF THE
)	SOUTH CAROLINA OFFICE
)	OF REGULATORY STAFF

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I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina (the “Commission” or “PSC”) regarding recovery of Daufuskie Island Utility Company, Incorporated’s (“DIUC” or the “Company”) reparations surcharge. Pursuant to a Settlement Agreement (“Settlement Agreement”)¹ filed on February 18, 2021, and entered into by all participating parties, the South Carolina Office of Regulatory Staff (“ORS”), Haig Point Club and Community Association, Inc. (“HPCCA”), Melrose Property Owner's Association, Inc. (“MPOA”), and Bloody Point Property Owner's Association (“BPPOA”) (collectively, the “POAs” or “Intervenors”) disagreed with the position put forth by DIUC (collectively, all parties referred to herein as “Parties”) regarding DIUC’s ability to charge its customers a reparations surcharge.² The Settlement Agreement contains a provision outlining how the Parties would brief the one remaining, and solely disputed issue – whether DIUC can charge its customers a reparations surcharge. Specifically, the Parties agreed to brief the matter to this Commission for further determination and that this proceeding would remain open “until the issue of reparations is fully adjudicated.”³ The sole issue for consideration before the Commission is whether DIUC may charge its customers a reparations surcharge resulting from its alleged “confiscatory” rates.⁴ Upon review of the Parties’ arguments and the record of evidence, this Commission denies DIUC’s request to charge its customers a reparations surcharge.

¹ The complete Settlement Agreement with attachments is attached as Order Exhibit No. 1 and incorporated herein by reference.

² See Settlement Agreement, paragraph 8.

³ *Id.*; Settlement Agreement, paragraph 8; Commission Order No. 2021-132, p. 5.

⁴ Commission Order No. 2021-132, pp. 5-6; Settlement Agreement, paragraph 8.

II. STATUTORY STANDARDS AND REQUIRED FINDINGS

The evidence supporting the Company's business and legal status is contained in its Application, testimony, and in prior Commission Orders, all of which the Commission takes judicial notice. The Company is a corporation duly organized and existing under the laws of the State of South Carolina engaged in the business of transmitting and distributing water and sewerage services to public and private users for compensation. DIUC is a public utility under the laws of the State of South Carolina, and it is subject to the Commission's jurisdiction with respect to its rates, charges, tariffs, and terms and conditions of service as generally provided in S.C. Code Ann. §§ 58-5-210 *et seq.*⁵ These findings of fact are informational, procedural, and jurisdictional in nature, and the matters that these findings of fact involve are not contested by any party.

South Carolina Code Ann. § 58-5-210 provides:

The Public Service Commission is [...] vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed by every public utility in this State and the State hereby asserts its rights to regulate the rates and services of every 'public utility'....

The Commission must determine a fair rate of return on the value of the property which a utility employs for the convenience of the public. The legal standards for this determination are set forth in *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602-03 (1944) ("*Hope*"), and *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 692-93 (1923) ("*Bluefield*").

⁵ See Application p. 3.

Bluefield holds that:

What annual rate will constitute just compensation depends upon many circumstances, and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting the opportunities for investment, the money market and business conditions generally.

Bluefield, 262 U.S. at 692-93.

This Commission and the South Carolina courts have consistently applied the principles set forth in *Bluefield* and *Hope*. In *Southern Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 596 (1978) (“*Southern Bell*”), the South Carolina Supreme Court, quoting *Hope*, held:

Under the statutory standard of ‘just and reasonable’ it is the result reached not the method employed which is controlling...The ratemaking process under the Act, i.e., the fixing of ‘just and reasonable’ rates, involves the balancing of investor and the consumer interests.

Id., 270 S.C. at 596-97, S.E.2d at 281 (quoting 320 U.S. at 602-03).

This Commission must exercise its dual responsibility of permitting utilities an opportunity to earn a reasonable return on the property the utility has devoted to serving the public, on the one hand, and protecting customers from rates that are so excessive as to be unjust or unreasonable, on the other, by “(a) [n]ot depriving investors of the opportunity to earn reasonable returns on the funds devoted to such use as that would constitute a taking of private property without just compensation [and] (b) [n]ot permitting rates which are excessive.” *Southern Bell*, 270 S.C. at 605,

244 S.E.2d at 286 (Ness, J. concurring and dissenting). Ultimately, this balancing act takes place within the context of a utility setting forth proposed rates—pursuant to Title 58, Chapter 5, Article 3 of the S.C. Code of Laws—for the exclusive purpose of the utility receiving revenue sufficient to yield a reasonable return.

The Commission's Findings of Facts and Conclusions reflect and apply these standards.

III. REVIEW OF PARTIES' ARGUMENTS AND CONCLUSIONS

A. Timing of this Proceeding

It is undisputed that this proceeding has been lengthy, and a common refrain from DIUC has been to blame other entities for the prolonged nature of these matters, which DIUC has used to justify its alleged ability to recover a reparations surcharge from its customers.⁶ Accordingly, at the outset of this Order, the Commission clarifies for the record the nature of these proceedings' length.

Every utility's rate proceeding before this Commission begins once the Commission accepts a utility's rate application for filing.⁷ From that date, the Commission is statutorily required to issue its order no more than six (6) months later.⁸ Tables 1, 2, 3, and 4⁹ below illustrate the length of this proceeding beginning on the day DIUC's rate application was accepted for filing

⁶ See DIUC Brief pp. 11, 12, 13, 19, 20, 21, 24, and DIUC Reply Brief pp. 4, 14, 18, 19, and 21.

⁷ See S.C. Code Ann. § 58-5-240.

⁸ *Id.* Pursuant to S.C. Code Ann. § 58-4-240(D), the Commission can extend the six-month period by an additional five days if it cannot issue the order within six months due to circumstances reasonably beyond its control.

⁹ All filings in the below tables are sourced from the Commission's Docket Management System (<https://dms.psc.sc.gov/Web/Dockets/Detail/115174>) or the South Carolina Appellate Case Management system (<https://ctrack.sccourts.org/public/caseView.do?csIID=61788> and <https://ctrack.sccourts.org/public/caseView.do?csIID=67676>).

on June 11, 2015, and ending on March 1, 2021, the day DIUC's settled-upon rates went into effect. The tables also briefly detail certain pertinent delays and expedited treatment given and their respective causes.¹⁰

Table 1

Initial Proceeding Before this Commission

Date	Occurrence	Notes
June 11, 2015	DIUC filed its Rate Application	Starting on this date, the Commission had 6 months to issue its final order.
June 24, 2015	DIUC filed Amended Statement of Proposed Rates	
December 8, 2015	Order No. 2015-846 issued	The Commission complied with the statutory time limits
December 21, 2015	DIUC filed a Petition for Reconsideration	
February 25, 2016	Commission Issued Order No. 2016-90 and Denies DIUC's Petition for Reconsideration	

As Table 1 makes clear, no party unduly lengthened the initial proceeding. The Commission complied with its statutory obligations and issued its order in accordance with the statute. Table 2 below details the time lapse that occurred during the first appeal.

Table 2

First Appeal

Date	Occurrence	Notes
March 22, 2016	DIUC filed a Notice of Appeal with the South Carolina Supreme Court	
March 30, 2016	DIUC filed for a thirty-day extension of time to file its Initial Brief with the Court	

¹⁰ Most of the requests that specifically impacted timing are highlighted.

Date	Occurrence	Notes
May 18, 2016	DIUC filed for an additional twenty-one-day extension of time to file its Initial Brief with the Court	
June 13, 2016	DIUC filed its Initial Brief with the Court	
August 1, 2016	Initial Briefs of ORS and POAs filed	Neither ORS nor the POAs filed for an extension of time to file their initial briefs.
August 2, 2016	DIUC files for a twenty-day extension of time to file its Reply Brief with the Court	
August 31, 2016	DIUC filed its Reply Brief with the Court	
December 14, 2016	Oral argument is held	
July 26, 2017	Court issues Opinion	The Court reversed and remanded the case back to the Commission for a <i>de novo</i> hearing and held that the Commission erred in approving and adopting the Settlement Agreement.
August 11, 2017	Case Remitted back to the Commission	
August 31, 2017	Parties jointly file a request for an extension to file a return and reply to Motion for Costs	
September 21, 2017	DIUC filed for an extension of time to file its Reply to the Returns for Motion for Costs	

As Table 2 makes clear, there were five (5) separate requests for extensions of time. DIUC was the sole party to request an extension in the first, second, third, and fifth instance, while the Parties jointly requested the fourth extension.¹¹ Neither ORS nor the POAs unjustly extended

¹¹ Both the fourth and fifth requested extensions occurred subsequent to the proceeding being remitted back to the Commission.

this initial appeal. Table 3 below details the time lapse that occurred during the second *de novo* proceeding before this Commission.

Table 3

Second *De Novo* Proceeding Before this Commission

Date	Occurrence	Notes
August 24, 2017	Commission issued Order No. 2017-52-H	In Order No. 2017-52-H, the Commission sought input from the parties in this matter on a possible procedural path forward on remand. The Commission requested comments back by September 11, 2017.
September 8, 2017	POAs requested an extension of seven-days to comply with Commission Order No. 2017-52-H as a result of the uncertainties caused by Hurricane Irma.	No party objected.
October 4, 2017	DIUC filed a Proposal for Procedural Path Forward	DIUC requested the Commission implement a schedule that would result in the issuance of a Commission order prior to the end of 2017.
October 10, 2017	Commission issued Order No. 2017-59-H, which established a procedural schedule.	Based on Commission Order No. 2017-59-H, the Hearing was to occur on January 30, 2018.
October 16, 2017	DIUC filed a Motion to Reconsider Commission Order No. 2017-59-H and establish an abbreviated procedural schedule.	
October 23, 2017	Commission issued Order No. 2017-61-H, which stated the Commission “[ruled] on the side of caution” to protect DIUC’s financial interests.	The Order also stated that because it was establishing abbreviated procedural dates, “it [was] incumbent upon DIUC to be prompt in responding to any discovery requests received from the other parties in this case.” The revised hearing date was scheduled to occur on December 5, 2017.
November 16, 2017	Commission issued Order No. 2017-73-H, allowing for a one-day extension of ORS to file responsive	

Date	Occurrence	Notes
	testimony resulting from the Court's Order regarding DIUC's Motion for Costs filed with that Court.	
November 29, 2017	DIUC requested a one-day extension to submit its Rebuttal Testimony	No party objected.
December 20, 2017	Commission issued a Directive regarding the <i>de novo</i> proceeding	
January 31, 2018	Commission issued Order No. 2018-68 setting Rates	
February 20, 2018	DIUC filed a Petition for Reconsideration	
May 16, 2018	Commission issued Order No. 2018-346, denying DIUC's Petition for Reconsideration	

As Table 3 indicates, there were three (3) separate requests for extensions of time, none of which exceeded one week. Accordingly, at the second *de novo* re-hearing, no party unfairly sought to extend the timing of this proceeding. On the contrary, this Commission substantially shortened the proceeding in order to err on the side of caution in protecting the financial interests of DIUC.¹² Table 4 below details certain events that occurred during the second appeal before the South Carolina Supreme Court.

Table 4

Second Appeal

Date	Occurrence	Notes
June 26, 2018	DIUC filed for a thirty-day extension of time to file its Initial Brief with the Court	
August 13, 2018	DIUC filed its Initial Brief with the Court	

¹² See Commission Order No. 2017-61-H.

Date	Occurrence	Notes
August 28, 2018	Respondents jointly moved for an extension of thirty days to file their Initial Briefs	Counsel for DIUC consented to the extension.
September 27, 2018	ORS filed for a twenty-one-day extension of time to file its Initial Brief	Counsel for DIUC and POAs consented to the extension.
September 28, 2018	POAs filed for the same twenty-one-day extension of time to file its Initial Brief	Counsel for DIUC and ORS consented to the extension.
November 2, 2018	POAs and ORS filed their Initial Briefs with the Court	
November 5, 2018	DIUC filed for a seven-day extension of time to file its Reply Brief	
April 18, 2019	Oral Argument Held	
July 24, 2019	Court issued Opinion No. 27905 in which it reversed and remanded the proceeding back to the Commission	The Court did not address the merits of the appeal, but instead sent the proceeding back to the Commission for a third hearing and required the Commission and ORS to evaluate the evidence and carry out their responsibilities consistently, within the objective and measurable framework the law provides.
August 5, 2019	ORS filed a Petition for Rehearing	
August 8, 2019	POAs filed a Petition for Rehearing	
August 27, 2019	DIUC filed for a five-day extension of time to file its Response to Respondent's Petitions for Rehearing	
September 27, 2019	The Court denied the Respondents' Petitions for Rehearing	
September 27, 2019	The Court remitted the proceeding back to the Commission.	

As Table 4 indicates, all parties requested extensions; however, DIUC consented to all extension requests made by ORS and the POAs. Accordingly, the record reflects that no party unfairly lengthened the proceeding on the second appeal. Table 5 below details the time lapse that occurred during the third proceeding before the Commission.

Table 5

Third Proceeding Before this Commission

Date	Occurrence	Notes
November 15, 2019	DIUC filed letter requesting that a final hearing be scheduled at the Commission's earliest convenience. According to DIUC, "[b]ecause there have already been two hearings in this case, the record is fully developed and another hearing for further testimony or evidence is not necessary.	
December 6, 2019	ORS filed a letter stating that "[a]bsent the presentation of additional evidence by DIUC, [ORS] would not present additional evidence. As a result, at the third hearing on DIUC's application, provided DIUC submits no additional evidence, ORS is prepared to rest on the evidence it submitted in the initial two hearings."	
December 16, 2019	DIUC filed a letter "[thanking] Office of the Clerk, the Commission, and ORS for their timely attention to the November 15, 2019, hearing request...."	
January 10, 2020	Commission issued Order No. 2020-2H, which stated, "[b]y mutual agreement of the parties and the Commission, oral argument in the above-styled docket regarding the implementation of the decision of the Supreme Court of South Carolina in Opinion No. 27905 is scheduled to be held at the Commission's Hearing Room at 2:00 PM on Tuesday, January 21, 2020."	
January 14, 2020	DIUC filed a request for a one-day extension by which to file a memorandum regarding matters to be addressed on remand.	
May 20, 2020	Commission issued Order No. 2020-382, which, in compliance with the Supreme Court Opinion No. 27905,	

Date	Occurrence	Notes
	required the parties to conduct a hearing.	
June 9, 2020	Commission issued Order No. 2020-48H, which set a procedural schedule for the third hearing. ¹³	
July 14, 2020	ORS filed a Motion for Clarification and to Hold the Remaining Procedural Due Date in Abeyance	ORS sought clarification as to whether the Commission required additional information or if it could rely upon the record as it stood at the time. ¹⁴ To afford DIUC additional scheduling flexibility, ORS requested expedited consideration of the Motion and that the remaining procedural due dates be held in abeyance pending the Commission's issuance of a clarifying order. ¹⁵
November 25, 2020	DIUC filed a Motion for Extension of time to comply with Commission Order No. 2020-759, which granted ORS's Motion to Compel and required DIUC to provide ORS with pertinent information. ¹⁶	No party objected.
January 7, 2021	DIUC submitted a joint proposal on behalf of itself, ORS and the POAs requesting that this matter be set for hearing in late February or early March of 2021.	

¹³ In an effort to work with all Parties' schedules, the Commission originally proposed a hearing date of August 18, 2020; however, counsel for DIUC was unavailable for hearing until September 3, 2020. *See* Commission Matter ID No. 292156.

¹⁴ ORS conducted discovery pursuant to its statutory obligations; however, DIUC objected. In response, ORS sought clarification as to whether the Commission desired ORS continue its investigatory review or rely upon the record as it stood at the time. *See* ORS Motion for Clarification, p. 4.

¹⁵ *Id.* According to ORS's Motion, "[d]ue to the compressed timeline in this case, it may impose a burden upon the participating parties, particularly DIUC, to draft and file testimony without having the certainty a Commission Order would afford. As a result, ORS respectfully requests expedited consideration of this Motion for Clarification and that the remaining procedural due dates be held in abeyance pending the Commission's issuance of a clarifying order.

¹⁶ On December 2, 2019, ORS filed a letter indicating it did not object to DIUC's request for additional time.

Date	Occurrence	Notes
February 4, 2021	DIUC submitted a proposed schedule after conferring with ORS and the POAs and all parties coming to an agreement.	
February 11, 2021	DIUC made a filing with the Commission indicating the parties were in good faith negotiations to resolve the remaining issues in this matter and the parties jointly requested that the Commission hold the procedural due dates in abeyance.	
February 18, 2021	The Parties filed a Settlement Agreement.	
March 1, 2021	Settled-upon rates went into effect pursuant to Commission Order No 2021-132	

As Table 5 indicates, all parties requested extensions; however, the Parties also collaborated and agreed to amicable schedules. In one instance, ORS and the POAs accommodated their schedules to work with counsel for DIUC. Counsel for DIUC even thanked the Commission and ORS for their timely attention to scheduling matters.¹⁷ There is no indication throughout the third proceeding that DIUC was unfairly prejudiced as a result of the scheduling.

As the Tables indicate, DIUC asked for numerous extensions during the pendency of this proceeding.¹⁸ The Commission complied with its statutory framework and followed the Court's mandates. Moreover, DIUC, ORS, and the POAs participated in the proceedings. There is no

¹⁷“On behalf of my client, I thank the Office of the Clerk, the Commission, and ORS for their timely attention to the November 15, 2019, hearing request....” Letter filed by DIUC December 16, 2019.

¹⁸ While not considered by the Commission in this decision, the Commission notes that even as recently as September 13, 2021, DIUC continued to request that procedural deadlines be extended and the other parties continued to show flexibility. *See* DIUC request made on September 13, 2021, and Commission Order No. 2021-115-H.

indication that any party sought to unduly lengthen this proceeding, and DIUC even previously thanked ORS and Commission for their attention to scheduling matters.

Importantly, as a result of the multiple proceedings, DIUC was able to litigate this case multiple times, present new evidence following its appeals, and receive the benefit of these proceedings by recovering additional expenses as part of the approved rates.¹⁹ DIUC participated in each proceeding before this Commission and the Court and had the ability to assert its rights throughout the proceedings. The filings reflect that it was DIUC that oftentimes requested extensions and that the other parties consented to DIUC's requests for scheduling flexibility. As discussed more fully below, the Commission proceedings also were lengthened in part because DIUC willfully refused to cooperate with ORS's discovery requests. Accordingly, the record reflects that no party unfairly lengthened the proceeding, at least a portion of the proceedings' length is attributable to DIUC's own actions, and DIUC actually recovered expenses attributable to the ongoing hearings. For the aforementioned reasons, the Commission finds that DIUC has not been unfairly prejudiced by the length of these proceedings.

B. Discovery in a Rate Proceeding Before this Commission

DIUC also frequently implies that ORS conducted discovery in an inappropriate manner.²⁰ The record does not reflect that ORS's discovery requests were improper; however, assuming

¹⁹ In Commission Order No. 2018-68, DIUC received the benefit of recovering all expenses on which the Court gave guidance in its Opinion No. 27729 as well as newly incurred rate case expenses. *See Daufuskie Island Util. Co. Inc. v. S. C. Off. of Reg. Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017). In Commission Order No. 2021-132, DIUC received the benefit of recovering additional rate case expenses.

²⁰ *See e.g.* “[u]pon rehearing ORS and the Intervenors continued to oppose the Application’s requested increase of 108.9%, and even sought further discovery over DIUC’s objections thereby increasing DIUC’s rate case expenses.” DIUC Reply Brief, pp. 17, and 18; *see also* DIUC Brief, pp. 11 and 12.

parties served on DIUC improper discovery, DIUC's remedy was to seek protection from this Commission, which it failed to do. Nevertheless, ORS has statutory obligations it must fulfill, and it must review DIUC's request in an objective and measurable framework.²¹ Accordingly, ORS had a statutory obligation to conduct discovery relating both to the Application as filed and in each instance where DIUC presented new or previously undisclosed facts or ORS's investigation of DIUC raised new questions that required further investigation.

A review of the filings posted to the Commission's Docket Management System indicates that, despite the fact that DIUC's counsel filed a letter on November 15, 2019, stating the Company did not intend to introduce any additional evidence in this matter,²² DIUC filed 22 pages of testimony and 42 pages of exhibits on June 16, 2020.²³ As a result, ORS was statutorily obligated to review the testimony filed by DIUC and issue discovery requests to investigate the matters presented by the Company.²⁴

In response to ORS's requests, DIUC alleged that the discovery was in contradiction to the Court's instruction despite the fact that the Court explicitly stated "[i]n this reversal and

²¹ See S.C. Code Ann. § 58-4-50 and *Daufuskie Island Util. Co. Inc. v. S. C. Off. of Reg. Staff*, 427 S.C. 458, 463, 832 S.E.2d 572, 575 (2019).

²² Counsel for DIUC further stated that "the record is fully developed and another hearing for further testimony or evidence is not necessary."

²³ Commission Order No. 2020-382 required a Procedural Schedule be set and a limited hearing occur on "rate case expenses, plant in service, and reparations."

²⁴ South Carolina Code Ann. § 58-4-50 directs ORS to inspect, audit, and examine public utilities and make appropriate recommendations to the Commission regarding matters within the jurisdiction of the Commission when in the public interest. Moreover, ORS "must represent the public interest of South Carolina before the commission... 'public interest' means the concerns of the using and consuming public with respect to public utility services, regardless of the class of customer, and preservation of continued investment in and maintenance of utility facilities so as to provide reliable and high quality utility services." S.C. Code Ann. § 58-4-10(B).

remand, [the Court does] not address the merits at all.... Rather, we simply require the commission and ORS evaluate the evidence and carry out their important responsibilities consistently, within the ‘objective and measurable framework’ the law provides.”²⁵ Accordingly, counsel for ORS e-mailed counsel for DIUC on July 23, 2020, and “once again [reiterated] the [previously sent request] that all documentation that demonstrates payment of these invoices be provided.” Counsel for ORS stated ORS's position that it “is imperative that the parties cooperatively work together to ensure all pertinent information is readily available.” On July 24, 2020, ORS issued a second continuing request for production of documents for the second remand proceeding; however, DIUC continued its uncooperative posture.²⁶ In order to comply with its statutory obligation and enforce its rights to acquire the documents to which ORS was entitled by statute, ORS filed a Motion to Compel.²⁷ In response, DIUC stated “[t]he supposition that there has been some sort of incomplete response or that DIUC intentionally withheld information is totally ridiculous.”²⁸ However, at oral argument on the matter, counsel for DIUC conceded that DIUC *could* provide the requested reconciliation to ORS but merely chose not to.²⁹

On October 8, 2021, the Commission issued Order No. 2020-700 “[granting] the Motion to Compel filed by the ... ORS.” Subsequently, on December 11, 2020, DIUC produced discovery responses, including *new* information, totaling 134 pages to ORS. Much of the information that

²⁵ *Daufuskie Island Utility Company, Inc.*, 427 S.C. at 464, 832 S.E.2d at 575 (citation omitted).

²⁶ In part, DIUC asserted in its response that ORS’s discovery requests were “in direct contradiction of rulings of the South Carolina Supreme Court.” See DIUC’s August 7, 2020, response filed on the Commission’s Docket Management System.

²⁷ S.C. Code Ann. § 58-4-55.

²⁸ DIUC Response, p. 8.

²⁹ See Oral Argument Tr. p. 57, l. 15 through p. 61, l. 19.

DIUC produced related to expenses for which DIUC did not originally request recovery. Based upon the new information provided by DIUC in the third proceeding ORS was able to confirm certain rate case expenses were appropriate for recovery and recommend to the Commission that recovery from DIUC's customers was now just and reasonable.

ORS offered to cease discovery to the extent DIUC restrained from seeking to introduce new evidence into the record.³⁰ However, because DIUC introduced new facts to the Commission, and ORS had an obligation to investigate the new facts and utilize an objective and measurable framework to make a recommendation to this Commission, ORS issued additional discovery requests. Upon a review of the evidence and filings in this proceeding, this Commission finds no evidence to support DIUC's allegation that ORS inappropriately used discovery in contravention of the Supreme Court's instructions.

C. Whether the Settled-Upon Revenues and Rates Indicate that the Originally Sought Revenues and Rates were Just and Reasonable

DIUC Position

In its original Application, DIUC sought a 108.9% increase in its rates in order to generate additional revenue of \$1,182,301, which would have increased DIUC's total adjusted revenue to \$2,267,722. On February 18, 2021, ORS and the Intervenors agreed to settle the case and in doing so affirmed that the settled upon rates were "just, fair, and reasonable, [and...] in accord with applicable law and regulatory policy."³¹ The settled upon revenue number is \$2,267,714, which is an \$8 difference from the total revenue sought in original Application after over six years of

³⁰ See Letter filed by ORS on December 6, 2019.

³¹ Settlement Agreement at pp. 5-6; *see also* Order 2021-132.

litigation that DIUC asserts was required by the ORS and Intervenor's objections to this amount.³² DIUC's Request for Reparations is based upon these specific revenue amounts.³³ Although ORS argued "...the composition of those rates is substantively different,"³⁴ DIUC asserted that the difference ORS refers to is that a major component of the costs ORS agreed to include to reach the 108.9% increase are Rate Case Expenses that DIUC incurred as a result of fighting for an incremental 43% increase then an 88.5% increase via two appeals and rehearing. Accordingly, DIUC argues that the Settlement Agreement only allows DIUC to collect costs it incurred during the rate case up to the notice cap.³⁵ DIUC also asserts it is not being made whole by the new rates and that, even with the increase, it is suffering unconstitutional confiscation without the requested restitution.³⁶

As a result, DIUC asserts that ORS and the Intervenor's now agree to the Application's requested revenue but not until after they have cost DIUC additional legal and consulting fees and lost return without the adequate rates.³⁷

POA Position

According to the POAs, any comparison of the revenue produced by the originally proposed rates and the Current Rates could not support the relief sought by DIUC, and DIUC misleadingly conflates "revenues" with "rates."³⁸ Moreover, the POAs assert that DIUC

³² DIUC Reply Brief, p. 19.

³³ *Id.*

³⁴ ORS Brief at 8.

³⁵ DIUC Reply Brief, p. 21.

³⁶ *Id.*

³⁷ *See* DIUC Brief at pgs. 11, 12, 17, 24, 25; DIUC Reply Brief, p. 19.

³⁸ POAs Brief, p. 13.

overlooks the fact that the settled-upon rates reflect different assets and expenses (including expenses that changed over time) than the originally proposed rates and provided the following table.³⁹

	Application	Order on Second Rehearing
Total O&M Expenses	\$866,936	\$1,005,801
Net Operating Expenses	\$1,649,127	\$1,827,517
Net Operating Income	\$618,595	\$440,197
Rate Base	\$7,085,475	\$5,900,924
Rate of Return	8.73%	7.46%

The POAs state that these inputs changed because additional *de novo* hearings took place where additional evidence was presented.⁴⁰

The POAs assert that the settled upon rates reflect DIUC’s “legal and consulting fees” that have changed since its initial Application, and DIUC will have the right to seek additional incurred expenses in a future rate case.⁴¹ In other words, assuming only for the sake of argument the POAs “cost” DIUC anything over the length of this case, its ratepayer members are paying those legally incurred costs in the settled upon rates. Therefore, the POAs argue that the proposition that DIUC could recover more from ratepayers than what is already contained in the settled upon is not only unlawful and lacking a factual basis, but would also be grossly unfair.⁴²

Finally, \$699,631 in plant-in service assets, which DIUC included in its initial Application, are not part of the rate base approved by the Order on Second Rehearing.⁴³

³⁹*Id.*; *id.* at pp. 13-14.

⁴⁰ POAs Brief, p. 14.

⁴¹ POAs Brief, p. 16.

⁴² *Id.*

⁴³ *Id.*

ORS Position

According to ORS, the rates set forth in the Settlement Agreement are different than those sought by DIUC in its original Application.⁴⁴ ORS asserted that, while the dollar figure settled upon is nearly equal to the dollar figure that DIUC originally sought, the composition is substantively different.⁴⁵

ORS argued that the amount of rate case expenses, which are embedded in the \$2,267,714 of annual revenue for DIUC and were approved by the Commission as a result of the Settlement Agreement, vary significantly from what DIUC sought in the original application.⁴⁶ In its original Application, DIUC only sought recovery of approximately \$95,600⁴⁷ in rate case expenses.⁴⁸ Pursuant to Commission Order No. 2021-132, DIUC may now collect approximately \$910,790⁴⁹ in rate case expenses.⁵⁰ The difference is stark and clearly shows that while the total revenue value settled upon is nearly equal to the total revenue increase for which DIUC originally applied, the composition of those revenues is dramatically different.⁵¹

⁴⁴ ORS Brief, p. 8.

⁴⁵ *Id.*

⁴⁶ ORS Brief, p. 9; Additionally, ORS noted that it could not determine these expenses were justifiably recoverable when DIUC initially sought them and was only able to determine that these expenses were recoverable after the Commission granted ORS's Motion to Compel and DIUC produced additional data.

⁴⁷ See DIUC Application, Schedule W-C.1, Adjustment (15).

⁴⁸ *Id.*

⁴⁹ See Commission Order No. 2021-132, p. 4.

⁵⁰ ORS Brief, p. 11.

⁵¹ ORS Brief, p. 11.

ORS also asserts that the rate base expenses differ between what DIUC agreed to recover and what it sought in its original Application.⁵² The settled upon revenue excludes Utility Plant in Service of \$699,361.⁵³ According to the Settlement Agreement:

[t]he inclusion of \$542,978 for Guastella Associates' rate case expenses along with the additional legal rate case expenses, related minor, and fall-out adjustments generates \$2,267,714 of annual revenue for DIUC in DIUC's 2021 Rates. As shown in the Second Revised Notice of Filing the rates most recently noticed to DIUC customers indicated annual revenue of \$2,267,722. Including the \$699,361 in Utility Plant In Service would result in rates that exceed the noticed revenue of \$2,267,722.⁵⁴

DIUC agreed to "delay seeking recovery of the corresponding \$699,361 until its next rate filing...."⁵⁵ This is yet another example of the differences between the composition of revenues DIUC to which DIUC settled and the revenues it sought in the original Application.⁵⁶

ORS further asserts that while DIUC may now be allowed the opportunity to earn \$2,267,722 in revenue, the resulting rates were only determined to be just and reasonable by the Parties after the Commission compelled DIUC to comply with its regulatory and statutory obligations and DIUC agreed to forego seeking recovery of nearly \$700,000 in plant in service

⁵² ORS Brief, p. 12.

⁵³ Commission Order No. 2021-132, Order Exhibit 1, Paragraph 7.

⁵⁴ *Id.*

⁵⁵ *Id.* The dictates of due process require that utilities may not charge their customers rates greater than those noticed. *See* Article I, Section 22 of the South Carolina Constitution, which provides that "[n]o person shall be finally bound by a . . . quasi-judicial decision of an administrative agency . . . except on due notice and an opportunity to be heard[.]". *See also* The South Carolina Administrative Procedures Act requirement that "[o]ppportunity be afforded all parties to respond," S.C. Code Ann. § 1-23-320(E), and that "[f]indings of fact must be based exclusively on . . . matters officially noticed." S.C. Code Ann. § 1-23-320(I); *Kurschner v City of Camden Planning Comm'n* 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.").

⁵⁶ *Id.*

expenses.⁵⁷ Furthermore, the total revenues are comprised of very different rate case expenses than those that DIUC originally sought for recovery.⁵⁸ For the aforementioned reasons, ORS argues that the mere fact the Parties agreed on a revenue figure similar to that originally sought in DIUC's Application does not indicate that DIUC's original Application sought just and reasonable rates.⁵⁹

Commission Finding

Regarding DIUC's assertion that the other parties in this proceeding "cost DIUC six years of legal and consulting fees and lost return without adequate rates,"⁶⁰ this Commission has already reviewed the nature of this proceeding's length above and found that no party unfairly lengthened this proceeding.

In reviewing the record of facts and arguments put forth by the Parties, the Commission finds that despite the similarity in settled-upon and originally applied for revenue amounts, the composition of those revenue figures are significantly different. The revenue figure originally applied for reflected substantially different rate case expenses and rate base than the revenue amount settled upon by the Parties and approved by the Commission in Order No. 2021-132.

Moreover, the Company originally applied for the rates below:

⁵⁷ ORS Brief, p. 13.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ DIUC Brief, p. 12; DIUC Reply Brief, p. 19.

Amended Statement of Proposed Rates

		Haig Pt. Present Rates	Melrose Present Rates	DIUC Proposed Rates
I. <u>Residential Rates</u>				
A. <u>Water:</u>				
1)	Tapping Fees & 3/4" Meter Box	\$500.00	\$500.00	\$500.00
2)	Base Quarterly Charge	\$62.09	\$80.72	\$149.30
3)	Consumption Charge (per 1,000 gallons)	0 to 22,500 gallons per quarter	\$2.76	\$0.00
		Over 22,500 gallons	\$2.76	\$2.44
B. <u>Sewer:</u>				
1)	Tapping Fees & Service Lateral	\$500.00	\$500.00	\$500.00
2)	Base Quarterly Charge	\$110.38	\$80.72	\$218.18
3)	Volumetric Charge (per 1,000 gallons)	0 to 22,500 gallons per quarter	\$1.32	\$0.00
		Over 22,500 gallons	\$1.32	\$1.95
C. <u>Irrigation:</u>				
1)	Tapping Fees & 3/4" Meter Box	\$500.00	\$500.00	\$500.00
2)	Consumption Charge (per 1,000 gallons)	0 to 18,000 gallons per quarter	\$2.76	\$1.66
		18,001 to 60,000 gallons	\$3.09	\$1.66
		Over 60,000 gallons	\$3.50	\$1.66
II. <u>Commercial Rates</u>				
A. <u>Water:</u>				
1)	Tapping Fees per Hotel or Inn Room	\$250.00	\$250.00	\$250.00
2)	Tapping Fees up to 1-1/2" Meter	\$500.00	\$500.00	\$500.00
3)	Tapping Fees 2" or 3" Meter	\$1,500.00	\$1,500.00	\$1,500.00
4)	Tapping Fees for 6" Meter	\$3,500.00	\$3,500.00	\$3,500.00
	Note: Larger meters on a case by case basis.			
5)	Base Quarterly Charge	\$86.93	\$136.60	\$209.01
6)	Consumption Charge (per 1,000 gallons)	0 to 22,500 gallons per quarter	\$2.76	\$0.00
		Over 22,500 gallons	\$2.76	\$1.95
B. <u>Sewer:</u>				
1)	Tapping Fees per Hotel or Inn Room	\$250.00	\$250.00	\$250.00
2)	Tapping Fees 4" - 8" Sewer Pipe	\$500.00	\$500.00	\$500.00
2)	Base Quarterly Charge	\$178.21	\$136.60	\$305.45
3)	Volumetric Charge (per 1,000 gallons)	0 to 22,500 gallons per quarter	\$1.32	\$0.00
		Over 22,500 gallons	\$1.32	\$1.95
C. <u>Irrigation:</u>				
1)	Tapping Fees & 3/4" Meter Box	\$500.00	\$500.00	\$500.00
2)	Consumption Charge (per 1,000 gallons)	0 to 18,000 gallons per quarter	\$2.76	\$1.66
		18,001 to 60,000 gallons	\$3.09	\$1.66
		Over 60,000 gallons	\$3.50	\$1.66

However, the Company settled upon the rates below:

Daufuskie Island Utility Company, Inc.

Settlement Rates and Revenues
 (Billing Analysis)

WATER						
Customer	Classification	Consumption	Usage Charge	Units	Base Charge	Revenue
Haig Point-Residential	3/4" Meter			1,061	\$155.88	\$165,389
	0 to 22,500 gals.	8,360,179	\$4.47			\$37,370
	Over 22,500 gals.	3,192,728	\$4.47			\$14,271
Haig Point-Irrigation				727		
	0 to 18,000 gals.	8,367,838	\$4.91			\$41,086
	18,001 to 60,000 gals.	9,829,270	\$5.80			\$57,010
Melrose-Residential	3/4" Meter			452	\$155.88	\$70,458
	0 to 22,500 gals.	4,105,940	\$4.47			\$18,354
	Over 22,500 gals.	2,177,808	\$4.47			\$9,735
Melrose-Irrigation				100		
	0 to 18,000 gals.	1,368,330	\$4.91			\$6,719
	18,001 to 60,000 gals.	2,002,230	\$5.80			\$11,613
Haig Point-Commercial	Metered			106	\$218.23	\$23,132
	0 to 22,500 gals.	2,413,190	\$4.47			\$10,787
	Over 22,500 gals.	2,132,690	\$4.47			\$9,533
Melrose-Commercial	Metered			329	\$218.23	\$71,798
	0 to 22,500 gals.	1,752,659	\$4.47			\$7,834
	Over 22,500 gals.	2,544,703	\$4.47			\$11,375
Water Service Total		61,283,205		2,775		\$653,671
SEWER						
Customer	Classification	Consumption	Usage Charge	Units	Base Charge	Revenue
Haig Point-Residential	3/4" Meter			1,061	\$226.37	\$240,179
	0 to 22,500 gals.	8,360,179	\$2.41			\$20,148
	Over 22,500 gals.	3,192,728	\$2.41			\$7,694
Melrose-Residential	3/4" Meter			448	\$226.37	\$101,414
	0 to 22,500 gals.	3,926,008	\$2.41			\$9,462
	Over 22,500 gals.	2,296,390	\$2.41			\$5,534
Haig Point-Commercial	Metered			102	\$316.91	\$32,325
	0 to 22,500 gals.	2,362,530	\$2.41			\$5,694
	Over 22,500 gals.	2,132,690	\$2.41			\$5,140
Melrose-Commercial	Metered			329	\$316.91	\$104,263
	0 to 22,500 gals.	1,559,487	\$2.41			\$3,758
	Over 22,500 gals.	2,436,565	\$2.41			\$5,872
Water Service Total		26,266,577		1,940		\$541,483
REVENUE SUMMARY:						
Total Residential Water and Sewer Service Revenues						\$700,007
Total Commercial Water and Sewer Service Revenues						\$291,512
Total Irrigation Service Revenues						\$203,636
Total Water and Sewer Service Revenues						\$1,195,154
Availability Billing-Water Haig Point				1,917	\$112.23	\$215,145
Melrose				1,617	\$112.23	\$181,476
Bloody Point				368	\$112.23	\$41,301
Availability Billing-Sewer Haig Point				1,917	\$146.01	\$279,901
Melrose				1,617	\$146.01	\$236,098
Bloody Point				368	\$146.01	\$53,732
Total Water and Sewer Availability Revenues						\$1,007,652
Total Misc. Other Revenue						\$64,907
Total Operating Revenue						\$2,267,714

Accordingly, there is no dispute that the rates are also different.

Finally, while DIUC asserts in its brief that it is not being made whole by the new rates, the Settlement Agreement states, “[t]his Settlement Agreement results in rates for water and wastewater service that are just and reasonable and will allow the Company the opportunity to earn a reasonable return on the basis of its 2014 rate application.”⁶¹

As a result, the Commission finds that the similarities between revenue settled upon and revenue originally applied for do not indicate that the rates DIUC originally applied for were *de facto* just and reasonable.

D. Interpretation of S.C. Code Ann. § 58-5-240(D)

DIUC Position

According to DIUC, S.C. Code Ann. § 58-5-240(D) does not support the result proposed by ORS.⁶² DIUC states that, by the time the Commission was entering its first Order on Rehearing, it had obtained the first bond, then a second renewal bond that required a letter of credit supported by one of its owners.⁶³ However, the second bond expired on December 31, 2017, and DIUC asserts it was impossible to obtain another rate collection bond.⁶⁴ As a result, DIUC claims it had no choice but to implement whatever rate increase the Commission would allow so it could become effective by the January 1, 2018, billing for service provided during the last quarter of 2017.⁶⁵

⁶¹ Settlement Agreement, paragraph 5.

⁶² DIUC Brief, p. 17.

⁶³ *Id.* at p. 18.

⁶⁴ *Id.*

⁶⁵ *Id.*

POA Position

According to the POAs, the plain language of S.C. Code Ann. § 58-5-240(D) expressly provides the only mechanism for “protecting” rates on appeal, and DIUC did not follow that process when it appealed the Orders on Rehearing.⁶⁶ The POAs assert there is no language in S.C. Code Ann. § 58-5-240(D) or elsewhere in Title 58 that would allow the relief DIUC seeks.⁶⁷

ORS Position

ORS argues that DIUC is prohibited from collecting a reparations surcharge because the General Assembly created a statutory remedy to protect entities like DIUC by allowing them to place rates under bond pending appeal and DIUC did not avail itself of those protections pending resolution of the second appeal.⁶⁸ The reparations surcharge is not allowed under the law, and DIUC is limited to the remedies available under the law. The Commission sets “just and reasonable” rates, which are in turn collected by utilities from their customers. South Carolina Code Ann. § 58-5-240(D) states in part, “...[i]f the Commission rules and issues its order within the time aforesaid, and the utility shall appeal from the order, by filing with the Commission a petition for rehearing, the utility may put the rates requested in its schedule into effect under bond only during the appeal and until final disposition of the case....” Further, “[a] decision of the commission may be reviewed by the Supreme Court or court of appeals as provided by statute and the South Carolina Appellate Court Rules upon questions of both law and fact, as provided pursuant to this section....” S.C. Code Ann. § 58-5-340.

⁶⁶ POA Brief, p. 9.

⁶⁷ *Id.*

⁶⁸ ORS Brief, p. 4.

ORS asserts that South Carolina Code Ann. §§ 58-5-210, -240(D), and -340 collectively create a substantive right for DIUC (the right to appeal a Commission Order if the utility determines that rates ordered are not just and reasonable) and provide a remedy for infringement of that right (the right to charge its customers rates higher than those ordered by the Commission during the pendency of the appeal).⁶⁹ ORS points out that DIUC initially availed itself of the statutory protections provided in S.C. Code Ann. § 58-5-240(D) and received the commensurate benefit of charging its customers rates in excess of those approved by the Commission during the pendency of the first appeal.⁷⁰ However, during the pendency of the second appeal, and despite the availability of a statutory remedy, DIUC did not avail itself of the protections afforded by the South Carolina General Assembly.⁷¹ Accordingly, ORS asserts that because DIUC did not put its requested rates into effect under bond pending resolution of the second appeal, DIUC is prohibited from now collecting those revenues from its customers.⁷² *See Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 498, 413 S.E.2d 18, 19 (1992) (“[w]hen a statute creates a substantive right and provides a remedy for infringement of that right, the plaintiff is limited to that statutory remedy.” (citing *Campbell v. Bi-Lo*, 301 S.C. 448, 392 S.E.2d 477 (Ct.App.1990))).

ORS also argues that there is sound policy to prohibit DIUC from retroactively recovering reparations from its customers.⁷³ The General Assembly set forth a specific mechanism in S.C.

⁶⁹ ORS Brief, p. 5.

⁷⁰ ORS Brief, p. 5. *See also* Commission Order No. 2016-156. Other utilities have also recently attempted to utilize the protections afforded by S.C. Code Ann. § 58-5-240(D). *See* Motion for Approval of Bond of Blue Granite Water Company, Commission Docket No. 2019-290-WS, filed on June 8, 2020.

⁷¹ ORS Brief, p. 5.

⁷² *Id.*

⁷³ ORS Brief, p. 5.

Code Ann. § 58-5-240(D), which would have allowed DIUC to recover the revenue it would have realized from its requested rates. According to ORS, this well-reasoned procedure creates specific checks and balances for both utilities and their customers.⁷⁴ If the utility avails itself of the protections afforded by S.C. Code Ann. § 58-5-240(D) and the appellate court reverses the Commission, then during the pendency of the appeal the utility will have collected from its customers the rates it originally sought. However, if the appellate court affirms the Commission's order, then that utility must return to its customers the unlawfully charged rates, with interest. ORS argues that, through this mechanism, the General Assembly balanced the interests of utilities and their customers.⁷⁵ ORS therefore asserts that if the Commission were to grant DIUC's request to retroactively collect a reparations surcharge in this case, the Commission would allow DIUC the ability to collect rates outside of the authorized statutory parameters.⁷⁶ Such Commission action not only would exceed its statutory authority but also would signal to utilities that they need not follow the bond statute and still may recover additional monies.⁷⁷ For these reason, ORS argues that DIUC's unlawful request is not permitted by law and would upset the careful balance set-forth by the General Assembly.⁷⁸

⁷⁴ *Id.*

⁷⁵ *Id.* at p. 6.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

Commission Finding

The Commission previously concluded that ORS did not unfairly lengthen this proceeding.⁷⁹

Through S.C. Code Ann. § 58-5-240(D), the South Carolina General Assembly offered protections to DIUC by providing it a substantive right and a remedy for infringement of that right. DIUC is limited to the remedy made available to it by the General Assembly.⁸⁰ Accordingly, because DIUC did not avail itself of the protections afforded by the General Assembly, DIUC is prohibited from now collecting its proposed reparations surcharge from its customers. There are also policy considerations underpinning a prohibition on DIUC charging its customers these reparations.⁸¹

In addition, S.C. Code Ann. § 58-5-240 is unequivocal and makes no exemption for a utility that does not avail itself of the specific protections established by the General Assembly, regardless of DIUC's alleged justification. This Commission has never made a finding of fact in this proceeding that DIUC could not afford a bond. The General Assembly created a substantive right for DIUC and provided a remedy for infringement of that right and DIUC is limited to the statutory remedy made available to it. The Commission finds that because DIUC did not avail itself of the statutory remedy, it is legally prohibited from collecting the reparations it seeks.

⁷⁹ *Supra*, section III.A. DIUC also mistakenly asserted that the Court rejected “every single position asserted by ORS.” DIUC Brief, p. 20. A review of the Court’s Opinion’s makes clear DIUC’s assertion is incorrect.

⁸⁰ *See Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 498, 413 S.E.2d 18, 19 (1992).

⁸¹ *See* ORS Brief, pp. 5-6.

E. Constitutional Protections Afforded to DIUC

DIUC's Position

According to DIUC, Constitutional protections require the relief sought by DIUC. DIUC alleges that the length of this case and the costs DIUC has had to expend to pursue two appeals cannot be wholly addressed by implementation of the settled upon rates.⁸² Therefore, DIUC asserts it is entitled to recoup lost revenues that it should have been able to collect.⁸³

DIUC cites *Bd. of Pub. Util. Comm'rs v. New York Tel. Co.* and states “[t]he just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service, and rates not sufficient to yield that return are confiscatory.”⁸⁴ Rates are confiscatory if they do not address the cost of property of the utility and all sums required to meet operating expenses.⁸⁵ DIUC claims its insufficient rates since Order 2015-846’s increase of only 43% have not provided DIUC its constitutionally guaranteed just compensation for its property used and its operating expenses, given the duration of this rate proceeding.⁸⁶

DIUC also cites *Hope Nat. Gas Co.* and argues that when reviewing a rate order’s impact by looking at the order in its entirety to determine whether the rate order is “just and reasonable,”

⁸² DIUC Brief, p. 12.

⁸³ *Id.* at p. 13.

⁸⁴ *Id.* (citing *Bd. of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 31(1926) (citations omitted)).

⁸⁵ *Bluefield Waterworks*, 262 U.S. at 691.

⁸⁶ *Id.* at 14.

the focus of a reviewing court is to be upon “the result reached not the method employed” to achieve the result.⁸⁷

According to DIUC, applying this result-based analysis to the rates at issue requires the reviewing body to address “the financial integrity of the company whose rates are being regulated ... [because] from the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business.”⁸⁸ *Hope Nat. Gas Co.*, 320 U.S. at 603, 64 S. Ct. at 288. To be constitutionally appropriate, the ultimate result of the rates permitted DIUC must be “a return to the equity owner [that is] commensurate with returns on investments in other enterprises having corresponding risks.” *Hope Nat. Gas Co.*, 320 U.S. at 603, 64 S. Ct. at 288.⁸⁹

Finally, DIUC asserts that the record in this case, previous testimony, and the Guastella Affidavit⁹⁰ demonstrate the rates permitted in this case were constitutionally insufficient and, as such, the requested relief is necessary to remedy violation.⁹¹

POA Position

In contrast, the POAs point out that the Commission has made no finding that entitles DIUC to the relief it seeks, and that DIUC’s arguments that the Commission approved rates were “insufficient rates” (DIUC Brief, p. 14), “constitutionally insufficient” (DIUC Brief, p. 16),

⁸⁷ *Id.* at 15 (citing *Hope Nat. Gas Co.*, 320 U.S. at 602).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ As stated previously, paragraphs 11 through 17 of DIUC’s Exhibit B were struck from consideration pursuant to Commission Order No. 2021-501, issued on July 26, 2021, and are not considered as part of this Order.

⁹¹ *Id.* at pp. 16-17.

violated “DIUC’s federal and state constitutional rights” (DIUC Brief, p. 17), or otherwise improper are bare assertions and nothing more.⁹² The POAs further point out that there has been no finding from this Commission addressing or granting these claims made by DIUC and the factual claims that would presumably support DIUC’s request have not been adopted as findings by this Commission.⁹³ Additionally, the S.C. Supreme Court made no such determinations. Therefore, the POAs argue that the Commission could not rely on a “finding” or “conclusion” that the Initially Approved Rates, the Subsequently Approved Rates, or any other rates, were “insufficient” or otherwise improper as argued by DIUC. The POAs also point out that neither the Commission nor the Court ruled, prior to the Order on Second Remand, that DIUC was entitled to a 108.9% rate increase.⁹⁴ Specifically, the Court did not direct the Commission to enter an order that would have resulted in that rate increase, and neither approved any such rates prior to the Order on Second Rehearing.⁹⁵

Regarding DIUC’s claim of lost revenues, the POAs assert that DIUC’s request is

...based not any particular expense or asset or other rate input, but instead on a flawed assumption (DIUC was entitled to these revenues all along) that is completely divorced from a ratemaking process that requires a demonstration of assets and expenses as a necessary precursor to revenues.⁹⁶

⁹² POAs Brief, p. 12.

⁹³ *Id.*; According to the POAs, the Orders, Orders on Rehearing, and the Order on Second Rehearing make no such findings. *Id.*

⁹⁴ *Id.* at p. 13.

⁹⁵ *Id.*

⁹⁶ *Id.* at p. 14.

The POAs, therefore, argue that DIUC's request is arbitrary and completely unsupported.⁹⁷ Moreover, because DIUC was able to "introduce new evidence that altered" recovery of expenses in its Application and advocate continually for a higher rate base over the course of this proceeding DIUC had the ongoing ability to seek recovery of updated expenses.⁹⁸ As a result, the POAs assert there are no lost revenues that DIUC should be able to collect, because DIUC never established the right to collect any such revenues in rates.⁹⁹

Commission Finding

Regarding DIUC's claims that the length of this case caused it to expend costs that cannot be wholly addressed by implementation of the settled upon rates, the Commission previously concluded that no party unfairly lengthened this proceeding.¹⁰⁰

DIUC also argues that the length of this proceeding entitles it to recoup lost revenues that it "should have been able to collect."¹⁰¹ However, as noted by the POAs, DIUC had the ability throughout this proceeding to introduce new evidence to cover ongoing expenses as they were incurred. Additionally, there has been no finding that any expense is now recoverable and

⁹⁷ *Id.*

⁹⁸ *Id.* at p. 16.

⁹⁹ *Id.*

¹⁰⁰ *Supra* Paragraph A.

¹⁰¹ DIUC Brief, p. 13 stating "[t]he length of this case and the costs DIUC has had to expend to pursue two appeals cannot be wholly addressed by implementation of the 2021 Rates per the Settlement Agreement. Over the past six years of this proceeding, DIUC has been placed in an inferior position because of the extensive delays in obtaining a final, proper rate ruling. Therefore, DIUC is entitled to recoup the lost revenues that it should have been able to collect...."

“should” have been recovered previously.¹⁰² Accordingly, this Commission finds that there are no lost revenues that DIUC should recover through a reparations surcharge.

The Commission also disagrees with DIUC’s assertion that, even with the increase, it is suffering unconstitutional confiscation without the requested reparations surcharge.¹⁰³ The Settlement Agreement “results in rates for water and wastewater service that are just and reasonable and [would] allow the Company the opportunity to earn a reasonable return on the basis of its 2014 rate application.”¹⁰⁴ Accordingly, this Commission finds that the implementation of the settled upon rates to be just and reasonable allow the Company the opportunity to earn a reasonable return on the basis of its 2014 rate application.

DIUC also cites *Bluefield* and asserts that the Company is entitled to “a fair return upon the value of that which it employs for the public convenience.”¹⁰⁵ While DIUC failed to tie its proposed reparations surcharge to any particular asset or expense,¹⁰⁶ assuming *arguendo* DIUC presented facts sufficient to tie this reparations surcharge to specific expenses, this Commission would still be without the ability to provide DIUC the recourse it seeks. According to DIUC its

¹⁰² While there are certain rate case expenses now recoverable that *could* have been recovered previously, they were only deemed recoverable once DIUC produced adequate justification and records made possible by Commission Order No. 2020-759, which granted ORS’s Motion to Compel. Therefore, these expenses *should not* have been recovered prior to the appropriate data and records being produced.

¹⁰³ DIUC Reply Brief, p. 21.

¹⁰⁴ Settlement Agreement, paragraph 5.

¹⁰⁵ DIUC Brief, p. 14 (*citing Bluefield*, 262 U.S. at 690). See also *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308(1989) (“If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.”)

¹⁰⁶ DIUC calculated the reparations surcharge based upon both the revenue figure it originally applied for and the revenue figure on which it settled. See DIUC Reply Brief, p. 19.

constitutional ability to recover a reparations surcharge is grounded in the principle that DIUC has a constitutional right to collect rates that meet minimum constitutional standards of a reasonable return on investment.¹⁰⁷ DIUC also argues that “[c]omplying with this constitutional due process requirement is mandatory and the reasoning is sound – when a utility invests in equipment and real property for use in providing service, the utility is allowed to charge rates sufficient to allow it to operate and maintain that plant in service.”¹⁰⁸

Based upon the briefs, it appears that neither the POAs nor ORS dispute the constitutional basis entitling a utility to the opportunity for a reasonable return on the value of the utility’s investment employed for the public convenience. However, DIUC specifically agreed *not* to seek the value of certain property that it claims to be used for public service in this proceeding. According to the Settlement Agreement:

DIUC's Application included \$8,139,260 of reported used and useful facilities included in Utility Plant in Service. Commission Orders 2015-846 and 2018-68 both reduced that amount by \$699,361. The inclusion of \$542,978 for Guastella Associates rate case expenses along with the additional legal rate case expenses, related minor, and fall-out adjustments generates \$2,267,714 of annual revenue for DIUC in DIUC's 2021 Rates. As shown in the Second Revised Notice of Filing the rates most recently noticed to DIUC customers indicated annual revenue of \$2,267,722. Including the \$699,361 in Utility Plant In Service would result in rates that exceed the noticed revenue of \$2,267,722. Therefore, DIUC will delay seeking recovery of the corresponding \$699,361 until its next rate filing, and the Parties agree to reserve their positions as to the \$699,361 reduction to Utility Plant in Service for consideration in DIUC's next rate case.¹⁰⁹

¹⁰⁷ DIUC Brief, p. 13. *See Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 107 at n.8, 708 S.E.2d 755, 761 (2011) (citing *Bluefield Waterworks & Improvement Co. v. Public Service Comm’n of W. Va.*, 262 U.S. 679, 690(1923) (explaining that where the rates allowed for a public utility company “are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service...their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.”)).

¹⁰⁸ *Id.*

¹⁰⁹ Commission Order No. 2021-132, p. 11; Settlement Agreement, paragraph 7.

Because DIUC agreed not to seek the expenses associated with this investment in this proceeding, it reasons that DIUC may not recover a reparations surcharge tied to this investment.

Additionally, the originally applied for revenue was \$2,267,722, the settled-upon revenue is \$2,267,714, and the total revenue ordered by the Commission on re-hearing was \$2,023,743.¹¹⁰ As detailed above, DIUC specifically agreed to forego recovery of any expenses tied to alleged \$699,361 in Plant In Service. The remainder of the revenue collected pursuant to the Settlement Agreement, which nearly matches the revenue DIUC noticed, is comprised almost entirely of updated rate case expenses.¹¹¹ Certain of these rate case expenses were not incurred by DIUC, or provided for the Parties review, until this the third proceeding and much of the remaining rate case expenses were not shown to be just and reasonably recoverable until this Commission ordered DIUC to provide documents it willfully withheld. Thus, certain of these expenses did not even exist and *could* not have been recovered until the third proceeding.¹¹² Moreover, because of DIUC's refusal to comply with its discovery obligations, the remaining rate case expenses that were recovered pursuant to the Settlement Agreement *should* not have been recovered until this third proceeding.¹¹³ Accordingly, while this Commission could only speculate as to property or expenses that on which the reparations surcharge is based, it is clear that these expenses consist, either of plant that DIUC agreed not to seek in this proceeding or of rate case expenses that were

¹¹⁰ Commission Order No. 2018-68.

¹¹¹ See Commission Order No. 2021-132, Order Exhibit 1, paragraph 7, “[t]he inclusion of \$542,978 for Guastella Associates’ rate case expenses along with the additional legal rate case expenses, related minor, and fall-out adjustments generates \$2,267,714 of annual revenue....”

¹¹² See *id.* See also ORS Brief, pp. 8-11.

¹¹³ *Id.* Moreover, DIUC previously unsuccessfully advocated for the inclusion of \$699,631 in plant-in service assets to its rate base, which DIUC voluntarily agreed not to seek in this proceeding. As such, DIUC has never been entitled have those assets included as part of its rates.

not available for recovery until the third proceeding before this Commission. Accordingly, DIUC has no entitlement to a reparations surcharge, the calculation of which is based either on plant it agreed not to seek or rate case expenses that were unrecoverable until the third proceeding.

DIUC also argues that, “[t]o be constitutionally appropriate, the ultimate result of the rates permitted DIUC must be “a return to the equity owner [that is] commensurate with returns on investments in other enterprises having corresponding risks.”¹¹⁴ After careful review of the record, DIUC has failed to present any evidence on which this Commission can rely that would indicate that the rates ordered by this Commission previously were not commensurate with returns on investments in other enterprises having corresponding risks.

DIUC also asserts that a constitutional taking has occurred. However, DIUC has pointed to no finding of fact by this Commission or the Court indicating that it was entitled property of which it was later deprived and has failed to show that it had a property interest taken by Commission Order.

The Fifth Amendment to the United States Constitution provides that “private property shall not be taken for public use, without just compensation.” U.S. Const. amend. V.¹¹⁵ However these protections arise only where a property right exists. As explained by the North Carolina Supreme Court:

Invocation of constitutional protection against takings without just compensation or without due process requires a property interest on the part of the person seeking such protection. Where there is no property interest, there is no entitlement to constitutional protection. To have a property interest that is subject to procedural

¹¹⁴ *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345, 346(1892).

¹¹⁵ The Fifth Amendment right to protection against takings is implicit in the Due Process Clause of the Fourteenth Amendment to the United States Constitution and applicable to the states. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

due process protection, the individual *must be entitled* to a benefit created and defined by a source independent of the Constitution, such as state law.¹¹⁶

Likewise, the South Carolina Supreme Court has stated that “[b]efore determining whether a taking has occurred, a court must first determine, what precisely, is the property at issue.”¹¹⁷

DIUC failed to produce the evidence required to show a constitutional taking occurred. In the context of setting rates for a regulated utility, a property right does not arise unless and until there is a finding the cost sought to be included in the rates is just and reasonable. DIUC did not, and cannot, show it had an entitlement to recover certain rate case expenses or the \$699,361 in rate base, the recovery of which it voluntarily has foregone in this case. DIUC also failed to indicate precisely the property at issue it alleges to have been unconstitutionally taken. Because DIUC had no entitlement to recover its rate case expenses or certain rate base from its customers, no unconstitutional taking occurred.

Additionally, assuming DIUC had tied the alleged taking to specific expenses, whether a taking has occurred in the utility rate-making context is inherently a fact-intensive inquiry and DIUC failed to place evidence in the record indicating that the disallowance of any particular expense would result in confiscatory rates. Accordingly, there is no evidentiary indication that an unconstitutional taking has occurred.

As stated by the POAs, there has been no finding from this Commission addressing or granting any such claim of unlawful or constitutionally insufficient rates. The Orders, Orders on Rehearing, and the Order on Second Rehearing make no such findings; and the Court made no

¹¹⁶ *State of North Carolina ex rel. Utils. Comm’n v. Carolina Utility Customers Ass’n*, 446 S.E.2d 332, 344 (N.C. 1994) (emphasis added).

¹¹⁷ *Dunes West Golf Club v. Mount Pleasant*, 401 S.C. 280, 306, 737 S.E.2d 601, 615 (2013).

such determinations.¹¹⁸ For the aforementioned reasons, this Commission finds that it cannot award a reparations surcharge to DIUC based on DIUC's allegation that previously approved rates were constitutionally insufficient.¹¹⁹

F. Whether DIUC Has Received the Benefits of Judicial Review

DIUC Position

DIUC claims that, unless the reparations surcharge is granted, it will not receive the benefits of Judicial Review and will have been denied constitutionally appropriate rates.¹²⁰ DIUC cites a case from Illinois and argues that after a rate order is judicially set aside, it would be unfair for the party losing the appeal to “continue to benefit from what has been determined to be unlawful portions of a rate increase.”¹²¹

DIUC also argues that, if it is not able to charge a reparations surcharge to address the shortfall in revenues and return created by, among other things, the length of this proceeding and the “seed” for judicial review, then DIUC will not be able to realize the full benefits of judicial

¹¹⁸ POAs Brief, p. 12. Also, in its Opinion No. 27729, the Court provided “guidance” to the Commission regarding specific issues, and in its Opinion No. 27905, the Court specifically “[did] not address the merits at all.” *See also* discussion on filed rate doctrine. *Infra*, section III.G.

¹¹⁹ Neither the Commission nor the S.C. Supreme Court ruled, prior to the Order on Second Remand, that DIUC was entitled to a 108.9% rate increase. Specifically, the S.C. Supreme Court did not direct the Commission to enter an order that would have resulted in that rate increase, and neither the Commission nor the Court approved any such rates prior to the Order on Second Rehearing.

¹²⁰ DIUC Brief, p. 24.

¹²¹ *Indep. Voters of Illinois v. Illinois Com. Comm'n*, 117 Ill. 2d 90, 104, 510 N.E.2d 850, 857 (1987).

review.¹²² Accordingly, DIUC asserts that failing to grant the requested relief would be contrary to the constitutional rights of DIUC.¹²³

ORS Position

ORS asserts that DIUC received the benefit of Commission and appellate review multiple times and notes that the Settlement Agreement specifically allows DIUC to continue to seek the benefit of judicial review.¹²⁴ Moreover, ORS argues that DIUC seeks not only judicial review in this proceeding but also interest from its customers that in some cases may exceed \$44,000 per certain customers.¹²⁵ According to ORS, DIUC's request is patently unjust and unreasonable.

Commission Finding

As discussed previously, the Commission finds that no constitutional violation occurred and, therefore, denying DIUC's request to charge its customers for reparations will not deny it "constitutionally appropriate rates" or the benefit of meaningful judicial review.¹²⁶

Regarding DIUC's assertion that it would be unfair for the party losing an appeal to "continue to benefit from what has been determined to be an unlawful portion of a rate increase,"

¹²² *Id.* DIUC Brief, p. 24.

¹²³ *Id.*

¹²⁴ Commission Order No. 2021-132, Order Exhibit 1, Paragraph 8, states, "[t]he Parties agree that this proceeding [...] will remain open until the issue discussed above in Paragraph 8 herein is fully adjudicated, including any appeals and final order(s) on remand, if necessary. The Parties reserve their right to appeal the Commission's decision regarding this issue."

¹²⁵ See Notice of Settlement, Increase in Rates, and Future Proceedings, Schedule II, filed with the Commission on March 31, 2021.

¹²⁶ *Supra*, section III.E. While this Order addressed the Constitutional sufficiency of rates previously, it also notes that DIUC agreed that its rates are sufficient in the Settlement Agreement.

it is within this Commission's sole authority to set rates¹²⁷ and neither this Commission nor the Court made a finding that a previous rate increase was unlawful.¹²⁸ Moreover, as discussed previously, DIUC received the benefit of the appeals process and was able to introduce additional evidence into the record. Therefore, DIUC received the benefit of additional proceedings and the recovery of expenses incurred subsequent to filing its original Application.¹²⁹

DIUC has had ample judicial review. Accordingly, this Commission does not agree with DIUC's assertion that absent granting it the ability to charge its customers reparations it would be denied judicial review.

G. Retroactive Ratemaking and the Relief Sought by DIUC

DIUC Position

DIUC asserts that this Commission ought to have no hesitation in approving the requested relief, which DIUC asserts would prevent it from being punished for circumstances it did nothing to create.¹³⁰

According to DIUC, "[t]he basic premise underlying the prohibition against retroactive ratemaking is that the setting of utility rates is a legislative function, even if carried out by administrative agency; therefore, utility rates, like any other legislation, generally can have only

¹²⁷ "The duty to fix a reasonable rate for a service performed by a public utility rests solely with the Commission, and neither [the Supreme] Court nor the circuit court can assume this responsibility." *Carolina Water Serv. Inc. v. S.C. Pub. Serv. Comm'n*, 272 S.C. 81, 86, 248 S.E.2d 924, 926 (1978).

¹²⁸ In Opinion 27729, the Court "conclude[d] the Commission erred in admitting into evidence and adopting the Settlement Agreement between ORS and the POAs. Therefore, we reverse and remand to the Commission for a de novo hearing." In Opinion No. 27905, the Court "[did] not address the merits at all."

¹²⁹ *See supra*, section III.A.

¹³⁰ DIUC Brief, p. 21.

prospective application....” 73B C.J.S. Public Utilities §141.¹³¹ DIUC cites a case from North Carolina where the North Carolina Supreme Court reasoned that ruling against refunds would deny adequate relief to appellants who appeal from erroneous orders of the Commission.¹³² *See State ex rel. Utilities Comm’n v. Conservation Council of N. Carolina*, 312 N.C. 59, 68, 320 S.E.2d 679, 686 (1984). Addressing the issue of retroactive ratemaking, the North Carolina Supreme Court focused on the distinction that there can be no retroactive ratemaking until a rate is final. Therefore, DIUC argued the reparations sought here by DIUC cannot by definition be retroactive ratemaking because the rates are not finally established until the appellate process is complete.¹³³

DIUC also cited Supreme Court of New Hampshire rulings regarding the concepts of restitution and unjust enrichment in support of refunds when a rate decision is altered on appeal:

In this context, the terms “restitution” and “unjust enrichment” are modern designations for the older doctrine of quasi-contracts, and the action, for “unjust enrichment,” therefore, lies in a promise implied by law, that one will restore to the person entitled thereto that which in equity and good conscience belongs to him. A refund order is consistent with general principles of restitution requiring the return of property after a judicial determination that it was improperly acquired.

Appeal of Granite State Elec. Co., 421 A.2d 121, 122–23 (N.H. 1980) (citations omitted).¹³⁴

¹³¹ *Id.*

¹³² *Id.* at p. 22.

¹³³ DIUC Brief, p. 22. DIUC also notes that ORS and the Intervenor have both agreed “that this proceeding, Docket No. 2014-346-WS, will remain open until the issue of reparations is fully adjudicated, including any appeals and final order(s) on remand, if necessary.” Order 2021-132, Order Approving Settlement Agreement and Further Procedure, at pp. 4-6 with Settlement Agreement.

¹³⁴ DIUC Brief, p. 23.

According to DIUC, the conclusion that DIUC's requested relief does not implicate retroactive ratemaking is further supported by the South Carolina Supreme Court's ruling in DIUC's first appeal wherein the Court stated:

Furthermore, we take this opportunity to overturn *Parker v. South Carolina Public Service Commission*, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986), to the extent it holds the Commission may consider new evidence on remand only if explicitly authorized to do so by an appellate court. We now hold that a remand to the Commission for a new hearing necessarily grants the parties the opportunity to present additional evidence. Rate cases are heavily dependent upon factors which are subject to change during the pendency of an appeal, thus it serves no purpose to bind parties to evidence presented at the initial hearing which may no longer be indicative of the current economic realities on remand.

Daufuskie Island Util. Co. Inc. v. S. C. Off. of Reg. Staff, 420 S.C. 305, 316, 803 S.E.2d 280, 286 (2017).¹³⁵ DIUC claims this ruling indicates that the South Carolina Supreme Court required the Commission on remand to apply a procedure that is based on the premise that the rate order appealed is not final because additional evidence can be provided as the parties are not bound by the previous record.¹³⁶

According to DIUC, because ORS and the Intervenors have both agreed "that this proceeding, Docket No. 2014-346- WS, will remain open until the issue of reparations is fully adjudicated, including any appeals and final order(s) on remand, if necessary," the issued rates are not final rates and, as such, the requested modification of the issued rates are not retroactive ratemaking.¹³⁷ DIUC asserts that, because this proceeding is an open proceeding, the data, evidence and information – as well as the rates to be ordered – are all subject to change in this

¹³⁵ *Id.*

¹³⁶ *Id.* at pp. 23-24.

¹³⁷ DIUC Reply Brief, p. 6. Order 2021-132, Order Approving Settlement Agreement and Further Procedure, at pp. 4-6 with Settlement Agreement.

docket, and those changes do not create retroactive ratemaking because they are not altering final orders of the Commission.¹³⁸

According to DIUC the Commission is required to focus on ascertaining the current economic realities at issue for DIUC, and that reality requires the reparations requested.¹³⁹

DIUC asserts in its brief that the reparations it seeks will not impose on any customer charges for the usage of water or sewer services by any other customer because DIUC kept records of past payments and refunds to each customer since this proceeding began so that precise amounts due for each account can be calculated then billed.¹⁴⁰ As a result, DIUC claims that only the customers who actually received water and sewer services from October 1, 2017 until March 1, 2021, will be billed for the difference.¹⁴¹ DIUC, therefore, claims that the requested relief is consistent with the “general principle that those customers who use the service provided by the utility should pay for its production rather than requiring future ratepayers to pay for past use.” *Porter*, 328 S.C. at 231, 493 S.E.2d at 97 (1997).¹⁴²

DIUC also cites a case from Rhode Island and argues that the concepts of statutory limitation and retroactive ratemaking must give way to protection of the rights of a utility guaranteed by the Constitution.¹⁴³ According to DIUC, in *New England Tel. & Tel. Co. v. Pub.*

¹³⁸ DIUC Reply Brief, p. 6.

¹³⁹ *Id.* at p. 7.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at p. 8.

¹⁴³ *Id.* at pp. 13-14.

Utilities Comm'n, the Supreme Court of Rhode Island addressed the rule of retroactive ratemaking and specifically identified the caveat to that rule:

This holding is accompanied by the caveat that a rate schedule which represents a deprivation of due process either in its inability to provide a fair return or in the grossly excessive time it took to correct good faith errors of the commission in arriving at the new rates would certainly entitle the company to some sort of extraordinary relief.

358 A.2d 1, 22 (1976).¹⁴⁴ (citations omitted). According to DIUC, this proceeding has covered a “grossly excessive” amount of time thereby delaying final relief to DIUC, and the traditional applications of retroactive ratemaking and statutory limitations must give way to protection of DIUC’s constitutional rights.¹⁴⁵

POA Position

The POAs assert that the prospect that a current ratepayer could be responsible for additional charges applicable to a rate for service provided in the past underscores the express statutory policy prohibiting retroactive ratemaking applied in South Carolina. *Porter*, 328 S.C. 222, 231 493 S.E.2d 92, 97 (“Retroactive ratemaking is prohibited based on the general principle that those customers who use the service provided by the utility should pay for its production rather than requiring future rate payers to pay for its past use.”).¹⁴⁶

¹⁴⁴ DIUC also noted that in the instant case, the circumstances are more suspect that those referenced in *New England Tel. & Tel. Co.*. For example, when discussing the status of this proceeding during its second appeal, the South Carolina Supreme Court stated behavior on rehearing following the first remand included “retaliatory actions by ORS” that were “deeply troubling” to the Court because they demonstrated “an unprofessional approach to the legitimate financial interests of South Carolina businesses, and of South Carolina utility ratepayers.” *Daufuskie Island Util. Co., Inc. v. S.C. Off. of Regul. Staff*, 427 S.C. at 463, 832 S.E.2d at 574. (emphasis in original).

¹⁴⁵ *Id.* at p. 14.

¹⁴⁶ POAs Brief, p. 14.

ORS Position

ORS argues the Company is prohibited from receiving the relief it seeks because the awarding of any rates that provide for the future collection of any claim of past lost revenues or interest would constitute impermissible retroactive ratemaking.¹⁴⁷ According to ORS, South Carolina courts have specifically held that rate-making is a prospective rather than a retroactive process.¹⁴⁸ *Porter v. S.C. Pub. Serv. Comm’n*, 328 S.C. 222, 231, 493 S.E.2d 92, 97 (1997) (stating retroactive ratemaking is “prohibited based on the general principle that those customers who use the service provided by the utility should pay for its production rather than requiring future ratepayers to pay for past use.”).¹⁴⁹

Similarly, ORS argues that the South Carolina General Assembly has not delegated to the Commission the power to correct or increase a previously approved rate for water and wastewater utilities by allowing a utility to retroactively collect revenues.¹⁵⁰ The Commission is statutorily empowered to correct established water and wastewater rates that it finds to be “unjust, unreasonable, noncompensatory, inadequate, discriminatory or preferential or in any wise in violation of any provision of law” but only on a going forward basis. S.C. Code Ann. § 58-5-290 (“[T]he Commission shall, subject to review by the courts, as herein provided, determine the just and reasonable fares, tolls, rentals, charges or classifications, rules, regulations or practices to be

¹⁴⁷ ORS Brief, p. 2.

¹⁴⁸ *Id.* at pp. 2-3.

¹⁴⁹ See also *S.C. Elec. & Gas Co. v. Pub. Serv. Comm’n of S.C.*, 275 S.C. 487, 491, 272 S.E.2d 793, 795 (1980); *Parker v. S.C. Pub. Serv. Comm’n*, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986), overruled on other grounds by *Daufuskie Island Util. Co., Inc. v. S.C. Office of Reg. Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017) (“Ratemaking is a prospective process, not a retroactive one. Any rate increases must be applied prospectively.”).

¹⁵⁰ *Id.* at p. 3.

thereafter observed and enforced and shall fix them by order as herein provided.” (emphasis added)). The Supreme Court applied this principal in *Porter* and held “the Commission has the continuing power to prospectively correct or reduce a previously approved charge.” *Porter*, 328 S.C. at 235, 493 S.E.2d at 99.¹⁵¹ Accordingly, ORS argues both the governing statutes and the precedent set by South Carolina Supreme Court stand in direct conflict with DIUC’s goal to recover retroactive reparations.¹⁵²

To the extent DIUC seeks equitable relief in this matter in the form of restitution, unjust enrichment, or similar concepts, ORS argues such “relief is generally available only where there is no adequate remedy at law. An adequate legal remedy may be provided by statute.”¹⁵³ *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm’n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). This rule applies in the context of ratemaking.¹⁵⁴ *See id.* In *Santee Cooper*, the Commission set a rate schedule of \$8.00 per month. *Id.* at 181, 379 S.E.2d at 120.¹⁵⁵ The Consumer Advocate appealed to the circuit court and requested the court place the \$8.00 rate into effect under bond. *Id.* at 181, 379 S.E.2d at 120-21.¹⁵⁶ The circuit court granted the motion and required the utility to file a bond undertaking to secure a refund with 14% interest if any was ordered at the conclusion of the case. *Id.* at 181, 379 S.E.2d at 121.¹⁵⁷ The Supreme Court reversed concluding the applicable bond statute did not authorize the requirement of a bond at the request of a party other

¹⁵¹ *Id.*

¹⁵² ORS Brief, p. 4.

¹⁵³ *Id.* at p. 6.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at p. 7.

¹⁵⁷ *Id.*

than the utility and that Administrative Procedure Act did not authorize the bond either. *Id.* at 182-84, 379 S.E.2d at 121-22.¹⁵⁸ The Consumer Advocate also argued the circuit court had inherent equitable power to place rates into effect under bond. *Id.* at 185, 379 S.E.2d at 122-23.¹⁵⁹ The Supreme Court held the circuit court lacked equitable authority because an adequate statutory remedy existed, reasoning “the court’s equitable powers must yield in the face of an unambiguously worded statute.” *Id.* at 185, 379 S.E.2d at 123.¹⁶⁰ According to ORS, the same reasoning applies here.¹⁶¹ DIUC had an unambiguous statutory remedy available to it in S.C. Code Ann. § 58-5-240(D); therefore, the Commission does not have authority to grant equitable relief.¹⁶²

Commission Finding

While DIUC again asserts that the length of this proceeding justifies this reparations surcharge, the Commission previously concluded that ORS did not unfairly lengthen this proceeding.¹⁶³

DIUC also asserts that the circumstances of this case are unique and that the Commission ought to have no hesitation in approving DIUC’s requested relief in order to “prevent DIUC from being punished.”¹⁶⁴ According to DIUC, other courts have found that making a prevailing party

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Supra*, section III.A.

¹⁶⁴ The Commission is a government agency of limited power and jurisdiction and lacks the authority to award damages. *See Kiawah Property Owners Group v. Public Service Comm.*, 359

whole following a successful appeal is not retroactive ratemaking and the reparations surcharge it seeks cannot by definition be retroactive ratemaking because these rates have not been finally established.¹⁶⁵

While this Commission certainly agrees that this case has been unique and relatively lengthy, it does not agree that DIUC has been punished. As stated earlier, DIUC in fact recovered expenses that it would not have recovered but for the additional proceedings.¹⁶⁶ Moreover, unlike the Texas case cited by DIUC, neither the Commission nor the Court have made any finding of fact that any of DIUC's expenses were lost as a result of an improper Order and there is no finding that any lost operating costs exist. Additionally, according to DIUC, the court in the Texas case based its finding of lost operating costs on expenses that "would have been recovered but for the erroneous order reversed on appeal."¹⁶⁷ However, in this proceeding, DIUC has voluntarily agreed not to seek recovery of \$699,361 in plant. Accordingly, it is clear that these expenses, which are presumably included in the revenue figure that DIUC asserts is the basis for its reparations surcharge, are *not* being recovered.¹⁶⁸

Regarding the finality of rates and the possibility of an additional appellate process, DIUC has made clear that the rates now being charged are lawful, just, and reasonable, and allow it the

S.C. 105, 109, 597 S.E.2d 145, 147 (2004). The Commission commits reversible error if it exceeds its statutory authority. S.C. Code Ann. § 1-23-380(A)(5).

¹⁶⁵ See *R.R. Comm'n of Texas v. High Plains Nat. Gas Co.*, 628 S.W.2d 753, 754 (Tex. 1981).

¹⁶⁶ *Supra*, section III.A.

¹⁶⁷ DIUC Brief, p. 22. See *R.R. Comm'n of Texas v. High Plains Nat. Gas Co.*, 628 S.W.2d 753, 754 (Tex. 1981).

¹⁶⁸ In the alternative, if DIUC utilized recently incurred rate case expenses to derive the revenue figure upon which its reparations surcharge is based, those expenses *could not* have been recovered until the third proceeding and, therefore, could not be lost operating expenses.

opportunity to earn a reasonable return on the basis of its 2014 application.¹⁶⁹ Additionally, no Party appealed Commission Order No. 2021-132, which approved the Settlement Agreement and set “just and reasonable” rates. DIUC asserts that this final rate structure has not been settled.¹⁷⁰ However, not only are the rates just and reasonable, but the reparations surcharge DIUC seeks is a one-time surcharge.¹⁷¹ Accordingly, the rate structure is settled. As a result, since March 1, 2021, DIUC has been charging its customers, lawful, just, and reasonable, and final rates. Moreover, the filed rate doctrine prevents a party from collaterally attacking previously determined rates where those rates were not found to be unlawful.¹⁷²

While the Parties agreed that this proceeding would remain open and subject to an appellate process, the continuation of the proceeding and any appellate process is limited to the confines of the reparations and any associated “surcharge.”¹⁷³ The Commission, therefore, finds that final rates have been established in this case and that these final rates are not subject to appeal.

¹⁶⁹ See Settlement Agreement, paragraph 5.

¹⁷⁰ DIUC Reply Brief, p. 11.

¹⁷¹ See NOTICE OF SETTLEMENT, INCREASE IN RATES, AND FUTURE PROCEEDINGS Public Service Commission of South Carolina, Docket No. 2014-346-WS, II. Notice of Ongoing Proceedings in Docket 2014-346-WS, filed on March 31, 2021.

¹⁷² The filed rate doctrine prevents collateral attacks on previously approved rates. According to Commission Order No. 2018-804, “the Commission is without statutory authority to order involuntary refunds of rates collected under duly approved tariffs. Doing so constitutes a violation of both the filed rate doctrine and retroactive rate-making. *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2005) (stating that the filed rate doctrine bars collateral attacks on previously determined rates); *Porter v. S.C. Pub. Serv. Comm’n*, 328 S.C. 222, 231, 493 S.E.2d 92, 97 (1997) (“Retroactive rate-making is prohibited.”).”

¹⁷³ See Settlement Agreement, paragraph 8.

The Parties have agreed that the only matter subject to appeal is whether DIUC is entitled to implement a surcharge to account for what it seeks in reparations.¹⁷⁴

Additionally, DIUC cited a North Carolina Supreme Court Opinion in support of the position that this Commission has the ability to grant DIUC's reparations.¹⁷⁵ However, the ability to order refunds in that case hinged on the North Carolina Utility Commission's statutory ability, and the North Carolina Supreme Court's opinion that those abilities extended to itself, to order refunds from the Duke Power Company ("Duke") to Duke's Customers for over-collections.¹⁷⁶

That case dealt with the North Carolina Supreme Court's decision to require a utility to refund its

¹⁷⁴ If a surcharge were to be granted, while it would certainly impact the bill of a DIUC customer, it would not change the final rate, which has already been set and is just and reasonable.

¹⁷⁵ This Commission notes that, unlike the South Carolina General Assembly, the North Carolina General Assembly created a statutory means by which the Commission can order refunds. *See* N.C.G.S.A. § 62-130, which states, "[i]n all cases where the Commission requires or orders a public utility to refund moneys to its customers which were advanced by or overcollected from its customers, the Commission shall require or order the utility to add to said refund an amount of interest at such rate as the Commission may determine to be just and reasonable; provided, however, that such rate of interest applicable to said refund shall not exceed ten percent (10%) per annum."

¹⁷⁶ "Duke concedes that G.S. §§ 62–130(e), 132 and 136 grant specific authority to the Commission to order refunds. However, Duke argues that G.S. § 62–94 which sets out the extent of appellate review prevents this Court from ordering refunds because it does not specifically grant such authority. G.S. § 62–94(b) gives the reviewing court the power to affirm, reverse, remand, or modify the order of the Commission if the substantial rights of the appellants have been prejudiced. This Court has often ordered refunds in the past, *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 306 S.E.2d 435 (1983); *State ex rel. Utilities Commission v. Edmisten*, 299 N.C. 432, 263 S.E.2d 583 (1980); *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 232 S.E.2d 184 (1977), and we hold that G.S. § 62–94(b) gives this Court ample basis for ordering refunds to ratepayers who have been charged unlawfully high rates. To hold otherwise would deny ratepayers who appeal from erroneous orders of the Commission adequate relief while allowing utilities to retain the proceeds of rates that were illegally charged. It defies common sense to believe that the Legislature intended such a result. We, therefore, hold that this Court is authorized to order refunds when the Commission has made an error of law in its rate making procedures." *State ex rel. Utilities Comm'n v. Conservation Council of N. Carolina*, 312 N.C. 59, 68, 320 S.E.2d 679, 685, 686 (1984).

customers for over-collections. Accordingly, there are substantive distinguishing factors between the present situation and the North Carolina case cited by DIUC that prevent that court's reasoning from being dispositive in this proceeding.

DIUC also raised the possibility of recovery of these reparations on the grounds of "restitution" and "unjust enrichment."¹⁷⁷ However, equitable relief in the form of restitution, unjust enrichment, or similar concepts, "is generally available only where there is no adequate remedy at law. An adequate legal remedy may be provided by statute."¹⁷⁸ This rule applies in the context of ratemaking.¹⁷⁹ DIUC had a statutory remedy available to it in S.C. Code Ann. § 58-5-240(D); therefore, the Commission does not have authority to grant equitable relief on this issue.

Finally, DIUC asserts that South Carolina's Supreme Court has supported the notion that DIUC's sought reparations do not implicate retroactive reparations. According to DIUC, where the Court allowed additional evidence to be presented on remand, it evidences that a rate order appealed is not final. *See Daufuskie Island Util. Co. Inc. v. S. C. Off. of Reg. Staff*, 420 S.C. 305, 316, 803 S.E.2d 280, 286 (2017). While the Court did allow additional evidence to be presented on remand, the rates in this proceeding are now final, just, and reasonable.¹⁸⁰ The only issue before this Commission now is whether reparations, in the form of a surcharge, may be added to the bill

¹⁷⁷ Additionally, as detailed above, no finding has been made by this Commission or the Court that DIUC lost revenue or expenses as a result of previous Commission Orders. Any finding of this nature would be erroneous, as highlighted by the fact that DIUC voluntarily chose to withdraw its request for the expenses and return associated with \$699,361 in Plant In Service pursuant to the Settlement Agreement, despite the fact it seemingly still seeks recovery of reparations associated with that Plant.

¹⁷⁸ *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989).

¹⁷⁹ *See id.*

¹⁸⁰ Commission Order No. 2021-132. *See also* Settlement Agreement, paragraph 5.

of DIUC's customers. Accordingly, pursuant to the Parties' Settlement Agreement, the Commission is no longer accepting evidence on any issue with the exception of the instance where "there is a dispute as to the amount of the surcharges and their implementation."¹⁸¹ Moreover, to the extent the Commission is required to evaluate the "current economic realities" at issue for DIUC, it looks to paragraph five (5) of the Settlement Agreement, which states that the final rates agreed are "just and reasonable" and will "allow the Company the opportunity to earn a reasonable return on the basis of its 2014 rate application."¹⁸² Accordingly, by DIUC's own admission, the current economic realities do not require the reparations surcharge that DIUC seeks. Additionally, as discussed previously, there has been no finding in this proceeding that any rates previously set were constitutionally deficient.¹⁸³ For the aforementioned reasons, this Commission finds that DIUC is being adequately compensated and is not entitled to charge a reparations surcharge.

Moreover, South Carolina courts have specifically held that ratemaking is a prospective rather than a retroactive process and retroactive ratemaking is "prohibited based on the general principle that those customers who use the service provided by the utility should pay for its production rather than requiring future ratepayers to pay for past use."¹⁸⁴

According to DIUC, the reparations surcharge it seeks correspond to "water and sewer services from October 1, 2017 until March 1, 2021."¹⁸⁵ Accordingly, the reparations surcharge

¹⁸¹ Settlement Agreement, paragraph 8.

¹⁸² See Settlement Agreement, paragraph 5.

¹⁸³ *Supra*, section III.E.

¹⁸⁴ *Porter v. S.C. Pub. Serv. Comm'n*, 328 S.C. 222, 231, 493 S.E.2d 92, 97 (1997); see also *Daufuskie Island Util. Co., Inc. v. S.C. Office of Reg. Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017).

¹⁸⁵ DIUC Reply Brief, p. 7.

is not based on prospective usage and instead DIUC seeks permission from this Commission to require its customers to pay for past use of water and sewer service, rather than production. In addition to the findings made above, upon review of the arguments made by the parties and the evidence of record, the Commission finds that DIUC seeks permission to bill its customers for surcharges corresponding to past service rendered. Accordingly, if DIUC were permitted to charge its customers these reparations, it would be impermissible retroactive ratemaking. The Commission, therefore, finds that these reparations constitute impermissible retroactive rates.

H. The Commission's Authority to Issue These Reparations

DIUC Position

According to DIUC, South Carolina courts have routinely held that regulatory bodies, including this Commission, not only possess those powers that statutes explicitly conferred upon them, but also possess the powers necessarily implied for those bodies to fulfil their statutorily imposed duties and roles.¹⁸⁶ In *Beard-Laney, Inc. v. Darby*, when discussing this Commission's implied powers, the Supreme Court stated:

Even a governmental body of admittedly limited powers is not in a strait jacket in the administration of the laws under which it operates. Those laws delimit the field which the regulations may cover. They may imply or express restricting limitations of public policy. And of course they may contain express prohibitions. But in the absence of such limiting factors it is not to be doubted that such a body possesses not merely the powers which in terms are conferred upon it, but also such powers as must be inferred or implied in order to enable the agency to effectively exercise the express powers admittedly possessed by it. To say otherwise would be to nullify the statutory direction that the agency shall have power to make rules and regulations governing the exercise of its powers and functions.

¹⁸⁶ See DIUC Reply Brief, pp. 8-9. See also *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991).

Beard-Laney, Inc. v. Darby, 213 S.C. 380, 389, 49 S.E.2d 564, 567 (1948).

The Court in *Beard-Laney* also noted that “delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public.”¹⁸⁷ DIUC argued that the reparations it seeks are an action within the express and implied powers of this Commission and, if there is a question of authority, the health and welfare at stake with the Commission’s duties justifies liberal construction so as to view implied powers broadly.¹⁸⁸

DIUC also asserts that, in *Carolina Water Serv., Inc. v. S.C. Pub. Serv. Comm’n*, 272 S.C. 81, 248 S.E.2d 924 (1978), the Supreme Court examined S.C. Code Ann. § 58-5-290 and concluded, after broadly interpreting the Commission’s authority, that:

While it is true the Commission is not a court and does not sit to enforce contractual rights, it is equally true the Commission exercises quasi-judicial powers in the fulfillment of its responsibility under Section 58-5-290 as the arbiter of the reasonableness of rates charged by public utilities.

Carolina Water Serv., Inc., 272 S.C. at 87, 248 S.E.2d at 927. DIUC, therefore, argues that the Supreme Court has instructed the Commission to take a broad view of its implied authority in considering S.C. Code Ann. § 58-5-290.¹⁸⁹ Applying that instruction here, DIUC argued that the Commission has the authority to act in this instance to protect the rights of DIUC.¹⁹⁰

¹⁸⁷ *City of Columbia v. Bd. of Health & Env’t Control*, 292 S.C. 199, 355 S.E.2d 536 (1987). (citation omitted).

¹⁸⁸ DIUC Reply Brief, p. 10; *See* S.C. Code Ann. § 58-5-210 (Commission is “vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed...”).

¹⁸⁹ DIUC Reply Brief, p. 10.

¹⁹⁰ *Id.*

In response to the POAs argument that the Commission is not authorized to enter the requested order because of *S.C. Elec. and Gas Co. v. Pub. Serv. Comm'n of S.C.*, 275 S.C. 487, 272 S.E.2d 793 (1980),¹⁹¹ DIUC asserts that until the appeals have concluded in this open docket, there is no final order.¹⁹² DIUC also asserts that there has been no “lawful rate” established, given that the Supreme Court reversed Commission Order 2018-68 and the complete rate structure has not been settled.¹⁹³

According to DIUC, ORS and the POAs’ reliance on *S.C. Elec. & Gas Co.* is misplaced.¹⁹⁴ In that case the Supreme Court evaluated whether the Commission had the power to award refunds to retail electric customers and ultimately ruled against the refunds.¹⁹⁵ However, DIUC asserts that case is different than the situation before the Commission because, according to DIUC, that case did not deal with a utility’s protected constitutional rights to earn a return on used and useful property or the constitutional requirement that utilities be permitted to earn enough to plan, attract capital, cover operating expense, and earn a profit.¹⁹⁶

DIUC asserts that it is not urging the Commission to refund retail electric consumers by way of reparations, which is the only type of reparations that the Court ruled the Commission

¹⁹¹ In that case, the Court stated, “[t]he Commission has no more authority to require a refund of monies collected under a lawful rate than it would have to determine that the rate previously fixed and approved was unreasonably low, and that the customers would thus pay the difference to the utility.”).

¹⁹² *Id.* at p. 11.

¹⁹³ *Id.* See also *Daufuskie Island Util. Co., Inc. v. S.C. Off. of Regul. Staff*, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019), reh’g denied (Sept. 27, 2019) (“The commission’s findings of fact and conclusions of law must be reversed. We remand to the commission for a new hearing.”).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

cannot award in *S.C. Elec. & Gas Co.*¹⁹⁷ According to DIUC, nothing in the opinion states that the Court’s holding applies to all types of reparations, or even any type of reparations, particularly the unique relief sought here to protect DIUC from confiscation of property and earnings.¹⁹⁸ DIUC also asserts that in *Hamm v. Cent. States Health & Life Co. of Omaha*, 299 S.C. 500, 502, 386 S.E.2d 250, 251 (1989), the South Carolina Supreme Court reviewed its decision in *S.C. Elec. & Gas Co.*, when considering the very same arguments made by ORS and the POAs here.¹⁹⁹ In *Hamm*, Central States relied on *S.C. Elec. & Gas Co.* to support its position stating that “[t]he Commission simply does not have any implied power to award refunds in the nature of reparations for past rates or charges; such powers must be expressly conferred by statute.”²⁰⁰ *Id.* at 504, 386 S.E.2d at 253. The Court rejected the application of *S.C. Elec. & Gas Co.* and ruled:

SCE&G is easily distinguished from the present case. In SCE&G, we held that the PSC had no authority to direct refunds pursuant to past-approved lawful rates. We reasoned that to have empowered the PSC to direct refunds in SCE&G, would have permitted them to engage in retroactive ratemaking. Under the present facts, the rates approved by the Commissioner were found to be unlawful. As such, a refund in this instance would not be considered retroactive ratemaking. *Id.*

DIUC further claims that, having distinguished *S.C. Elec. & Gas Co.* for the same reasons it is inapplicable here, the Supreme Court went on to conclude in *Hamm* “that S.C. Code Ann. § 38-3-110(1) (Supp.1987), which imposes the duty on the Insurance Commissioner to supervise and regulate rates, by reasonable and necessary implication, confers the authority upon the Commissioner to make refunds in this case.”²⁰¹ *Id.* at 386, 386 S.E.2d at 254. DIUC argues that

¹⁹⁷ *Id.* at p. 12

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at p. 13.

the same situation exists here and that there has been no “lawful rate” given that the Supreme Court reversed Commission Order 2018-68 and the complete rate structure is not settled.²⁰² Accordingly, DIUC asserts that the precedent cited by ORS and the POAs does not support a ruling that this Commission is without authority to provide the relief requested by DIUC.

POAs Position

According to the POAs, the Commission’s power to grant reparations must be expressly set out in a particular statute, and cannot be implied from the Commission’s general powers to regulate utilities like DIUC, much less implied from case law issued in other jurisdictions.²⁰³ Because the Commission possesses only that authority specifically granted by statute²⁰⁴ and no statute exists allowing the Commission to grant reparations, the POAs argue that the relief requested by DIUC cannot be granted.

ORS Position

According to ORS, this Commission simply lacks the authority to grant DIUC’s request for retroactive reparations.²⁰⁵ “[A]s creatures of statute, regulatory bodies are possessed of only those powers which are specifically delineated.” *S.C. Elec. and Gas Co. v. Pub. Serv. Comm’n of S.C.*, 275 S.C. 487, 489, 272 S.E. 2d 793, 794 (1980).²⁰⁶ “Any reasonable doubt of the existence in the commission of any particular power should ordinarily be resolved against its exercise of

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Piedmont v. Northern Railway Co. v. Scott, et al.*, 202 S.C. 207, 24 S.E.2d 353 (1943).

²⁰⁵ ORS Brief, p. 7.

²⁰⁶ *See also Piedmont & Northern Ry. Co. v. Scott*, 202 S.C. 207, 24 S.E.2d 353 (1943); *Black River Elec. Co-op., Inc. v. Pub. Serv. Comm’n*, 238 S.C. 282, 120 S.E.2d 6 (1961) (The Commission is a body of limited jurisdiction and only has those powers vested in it by act of the General Assembly).

the power.”²⁰⁷ According to the South Carolina Supreme Court, “[t]he Commission simply does not have any implied power to award refunds in the nature of reparations for past rates or charges; such power must be expressly conferred by statute.” *Id.* at 490, 795. (citations omitted).

South Carolina Code of Laws Title 58, Chapter 5 grants no authority to the Commission to issue reparations for this situation, and accordingly, the Commission lacks the authority to grant DIUC’s request.²⁰⁸

Similarly, ORS asserts that the General Assembly has not delegated to the Commission the power to correct or increase a previously approved rate for water and wastewater utilities by allowing a utility to retroactively collect revenues.²⁰⁹ The Commission is statutorily empowered to correct established water and wastewater rates that it finds to be “unjust, unreasonable, noncompensatory, inadequate, discriminatory or preferential or in any wise in violation of any provision of law” but only on a going forward basis.²¹⁰ S.C. Code Ann. § 58-5-290, further states “...the Commission shall, subject to review by the courts, as herein provided, determine the just and reasonable fares, tolls, rentals, charges or classifications, rules, regulations or practices to be *thereafter observed and enforced* and shall fix them by order as herein provided.” (emphasis added)). According to ORS, the Supreme Court applied this principal in *Porter* and held “the Commission has the continuing power to prospectively correct or reduce a previously approved charge.”²¹¹

²⁰⁷ See also *Piedmont & Northern Ry. Co.*, 202 S.C. at __, 24 S.E.2d at 360, (quoting 51 C.J. 36, 37).

²⁰⁸ *Id.* at p. 8.

²⁰⁹ ORS Brief, p. 3.

²¹⁰ See S.C. Code Ann. § 58-5-290.

²¹¹ *Porter*, 328 S.C. at 235, 493 S.E.2d at 99.

Commission Finding

According to S.C. Code Ann. § 58-5-210, the Commission is “vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed....” The Parties disagree as to whether this Commission has the statutory authority to grant this reparations surcharge. However, even utilizing a liberal construction of its explicitly and impliedly granted statutory powers, this Commission cannot award these reparations. As a regulatory body, this Commission has the ability award these reparations if it has the express statutory authority, which it does not, *or* if it is “necessarily implied for it to effectively fulfill the duties with which it is charged.”²¹² The charge of this Commission is to set just and reasonable rates. Even applying a broad view of its implied authority, as suggested by DIUC, by DIUC’s own admission it has now entered into final, lawfully set, just and reasonable rates.²¹³ Accordingly, regardless of whether this Commission has the implied authority to award a reparation surcharge, because the surcharge is not necessary for the Commission to carry out its duty to effectuate just and reasonable rates, the Commission *could not* require a reparation surcharge in this proceeding.

²¹² See *Captain’s Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991).

²¹³ See Settlement Agreement, Paragraph 5. While DIUC asserts multiple times that until the appeals have concluded in this docket, there is no final order, it agreed that the rates in the Settlement Agreement were “just and reasonable.” Moreover, any appeal only applies to whether a single reparation surcharge is levied upon DIUC’s customers and not towards the ability to charge the rates settled upon. See Settlement Agreement, paragraph 8; Settlement Testimony of John Guastella, p. 3, l. 22.

Moreover, precedent states that “[t]he Commission simply does not have any implied power to award refunds in the nature of reparations for past rates or charges; such power must be expressly conferred by statute.”²¹⁴ DIUC argues that ORS and POAs’ citation of this case is misplaced, by stating that case “did not deal with a utility’s protected constitutional rights to earn a return on used and useful property or the constitutional requirement that utilities be permitted to earn enough to plan, attract capital, cover operating expense, and earn a profit.”²¹⁵ However, this Commission dealt with DIUC’s constitutional protection arguments previously in this Order and relies upon the findings made therein.²¹⁶ Additionally, “[a]ny reasonable doubt of the existence in the commission of any particular power should ordinarily be resolved against its exercise of the power.”²¹⁷

For the aforementioned reasons, the Commission finds it is without authority to grant DIUC the ability to charge its customers the reparations it seeks.

I. Novel Evidentiary Facts Currently Before the Commission

POAs’ Position

According to the POAs, DIUC inappropriately seeks to present additional facts to the Commission through its briefs.²¹⁸ The POAs assert that there are no factual issues currently before the Commission, and the Commission only asked for briefs from the parties on the issue of

²¹⁴ *S.C. Elec. and Gas Co. v. Pub. Serv. Comm’n of S.C.*, 275 S.C. 487, 490, 272 S.E. 2d 793, 795 (1980) at 490, 795. (citations omitted).

²¹⁵ DIUC Reply Brief, p. 11.

²¹⁶ *Supra*, section III.E.

²¹⁷ *See also Piedmont & Northern Ry. Co.*, 202 S.C. at __, 24 S.E.2d at 360 (quoting 51 C.J. 36, 37).

²¹⁸ POA Brief, p. 17.

DIUC's entitlement to reparations.²¹⁹ The POAs argue that a factual determination would require the presentation of evidence, which would require a hearing.²²⁰ No hearing has been noticed in connection with this stage of this Docket. As such, the POAs argue DIUC inappropriately included the Affidavit of John Guastella ("Guastella Affidavit") as an Exhibit to its Brief.

DIUC's Position

DIUC argues the Commission should look to the record in this proceeding, including the Guastella Affidavit submitted with DIUC's Submission in Support of Request for Reparations, which includes sworn testimony regarding the nature and impact of rates upon DIUC.²²¹

According to DIUC, the Second Rehearing Testimony of Mr. Guastella, filed with the Commission on June 16, 2020, also presents support for any findings the Commission may wish to make.²²²

Commission Finding

"The Parties agreed and the Commission approved the method of adjudicating the question of reparations and surcharges ... was by filing briefs with the Commission."²²³ This was the process agreed upon by the Parties and ordered in Commission Order No. 2021-132.²²⁴ No Party petitioned the Commission to re-hear or re-consider Commission Order No. 2021-132.

²¹⁹ *Id.*

²²⁰ *Id.*; see Commission Rules 103-845, 103-846.

²²¹ DIUC Reply Brief, p. 15; Paragraphs 11 through 17 of DIUC's Exhibit B were struck from consideration pursuant to Commission Order No. 2021-501, issued on July 26, 2021, and are not considered as part of this Order.

²²² While DIUC pre-filed testimony of witness Guastella on June 16, 2020, that testimony was never introduced into the record and is not considered by this Commission as part of this Order.

²²³ Commission Order No. 2021-501, p. 4; see also Order No. 2021-132, p. 5.

²²⁴ See Settlement Agreement, paragraph 8; Order No. 2021-132, p. 5.

Subsequent to a Motion to Strike filed by ORS and pursuant to Commission Order No. 2021-501, paragraphs 11 through 17 of DIUC's Exhibit B were struck from the Guastella Affidavit and are not considered by the Commission.²²⁵ Additionally, witness Guastella's Second Rehearing testimony was not entered into the record for consideration by this Commission.

Accordingly, the Commission bases this Order upon the briefs submitted by the Parties and evidence of record in determining whether DIUC is entitled to charge its customers a reparations surcharge.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. DIUC is a public utility under the laws of the State of South Carolina, and it is subject to the Commission's jurisdiction with respect to its rates, charges, tariffs, and terms and conditions of service as generally provided in S.C. Code Ann. Sections 58-5-210 *et seq.*

2. No party unfairly lengthened the proceeding.

3. The Commission finds that, simply because the settled-upon total revenue amount is roughly equal to the applied for total revenue amount does not mean the originally applied for revenue amounts and rates proposed by DIUC in the original Application are inherently just and reasonable.

²²⁵ See Commission Order No. 2021-501, which states,

1. Paragraphs 11-17 of the Guastella Affidavit exceed the parameters of proper evidence in this briefing phase of the case.
2. The Settlement Agreement clearly limited the scope of submissions to the Commission to evidence concerning reparations and surcharges.
3. Paragraphs 11-17 should be stricken from the record of this case since they addressed other subject matter.

4. The Commission approved rates did not result in DIUC incurring lost revenues that DIUC may now recover through a reparations surcharge.

5. The Commission approved rates, which went into effect March 1, 2021 are final, just, and reasonable and will allow the Company the opportunity to earn a reasonable return on the basis of its 2014 rate application.

6. DIUC is adequately compensated based on the settled upon and Commission approved rates.

7. DIUC did not avail itself of the statutory remedy in S.C. Code Laws 58-5-240; therefore, it is legally prohibited from collecting the reparations surcharge it seeks.

8. The reparations surcharge that DIUC seeks to levy upon its customers constitute impermissible retroactive rates.

9. The Commission is without the authority to grant DIUC the relief it seeks.

V. IT IS THEREFORE ORDERED THAT:

1. DIUC may not charge its customers the reparations surcharge it seeks.

2. This Order shall remain in full force and effect until further Order of this Commission.

BY ORDER OF THE COMMISSION:

Justin Williams, Chairman

ATTEST:

Florence P. Belser, Vice-Chairman